REPORTS

OF

CASES

ARGUED AND DETERMINED

In the High Court of Chancery,

IN THE TIME OF

Lord Chancellor HARDWICKE.

BY

JOHN TRACY ATKYNS,

Of LINCOLN'S INN, Esq.

CURSITOR BARON OF THE EXCHEQUER.

The THIRD EDITION, revised and corrected;
With NOTES, and REFERENCES to FORMER and MODERN
DETERMINATIONS, and to the REGISTER'S BOOKS,

By FRANCIS WILLIAMS SANDERS,
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IN THREE VOLUMES.

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1794.

THE

PREFACE.

IN the books of Reports which have lately been publiſhed, the Caſes by being placed in the order they were determined, without the leaſt connection in reſpect to the matter, are if I may be allowed the expreſſion, a Journal of Caſes only, and, upon that account, more likely to confound the reader, by ſtepping ſo abruptly from one head of equity to another, than if he was to take in, at one view, the whole that relates to each ſeparate branch: This was the reaſon which induced me to range the Caſes under their particular heads of equity, in an alphabetical ſeries; and though my methodizing them in this manner, has occaſioned me infinite trouble, yet I ſhall think myſelf ſufficiently recompenſed, if it anſwers the end I deſign by it, which is, inſtead of a book of reports, to make it, in ſome meaſure, a digeſt, or ſyſtem of equity.

I am aware only of one objection, that in the ſame caſe there may ariſe different points of equity, which do not correſpond with the principal one; this I hope is obviated, by a reference under the proper heads, to the reſpective pages, where theſe ſeveral points may be found.

It is my chief ambition, to contribute, as far as lies in my power, to the good of the publick, by communicating to the world a collection of Cases, which must be of universal benefit to mankind, when considered as the determinations of a judge, so eminently distinguished for his ability and integrity.

"*Illius vita multis erit præclarisque monumentis ad omnem memoriam commendata; admirabilis quædam, et incredibilis, et pene divina ejus in legibus interpretandis, æquitate explicanda, scientia; neque enim ille magis juris consultus quam justitiæ fuit**."

* Cic. Orat. Philipp. Nona.

EDITOR's PREFACE

TO THE

THIRD EDITION.

HAVING completed a Third Edition of Mr. *Atkyns's Reports*, the Editor thinks it neceſſary to acquaint the Profeſſion with the general plan, which he has purſued upon this occaſion. To examine the caſes with the Regiſter's Books, and to correct them, when found neceſſary, has been his principal object. Where a correction has been thought in any wiſe material to the deciſion of a Caſe, it has been diſtinguiſhed by a ſeparate note. In ſome very few inſtances a ſlight alteration in the original text has been adopted, with a view of making it correſpond with the Regiſter: but this has been done in ſuch caſes only, where the alteration has been deemed too inconſiderable to require a diſtinct note. In other reſpects the original text has been fully preſerved. When it has been thought unneceſſary to make extracts (the caſe being conſidered ſufficiently correct without them), a mere reference to the folio, letter, and year of the Regiſter's Book has been added. The Editor muſt take this opportunity however of obſerving, that he has frequently experienced his reſearches in the Regiſter's Books anticipated by the previous

 labours

labours of Mr. *Atkyns*. That gentleman, before the publication of his Reports, had certainly compared many of them with the records; and this is evident, not only from his own declaration in the preface to his second volume, but more especially as many of his statements of cases and decrees thereupon are taken almost *verbatim* from the Register's Books.

To the present Edition a variety of references have been made to cases determined, as well before, as subsequent, to the original publication of these Reports. Some MSS. Cases have ikewise been added; and to each volume is prefixed a Table of the Names of the Cases referred to by the notes contained in such volume. Upon points which have been considered material, notes have been subjoined, in which the principles of the several cases relative thereto, have been carefully extracted and explained.

The Editor has now to express his hopes, that the additions, which he has made to this Edition, may render this work still more useful and acceptable to the Profession.

Lincoln's-Inn New Square, No. 7.
October 10th 1794.

A

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A LIST of the Masters of the Rolls during the time LORD HARDWICKE was Chancellor; and also of Attornies and Solicitors General, and King's Counsel, who were conversant in the Court of Chancery during that period.

Masters of the Rolls.

SIR JOSEPH JEKYLL appointed Master of the Rolls *July* 13, 1717, and continued in this office till the latter end of the year 1738.

The Honourable JOHN VERNEY succeeded him *October* 9, 1738.

WILLIAM FORTESCUE, Esq; appointed *November* 5, 1741.

Sir *John Strange*, *January* 11, 1749—50.

Sir *Thomas Clarke*, *May* 29, 1754.

Solicitors General.

Sir *Dudley Ryder* appointed *November* 30, 1733.

Sir *John Strange*, *January* 28, 1736.

The Honourable *Willam Murray*, *November* 27, 1742.

Sir *Richard Lloyd*, *April* 10, 1754.

The Honourable *Charles York*, *November* 3, 1756.

Attorneys General.

Sir *Dudley Ryder* appointed *January* 28, 1736.

The Honourable *William Murray*, *April* 9th 1754.

Sir *Robert Henley*, *November* 3, 1756.

King's Counsel.

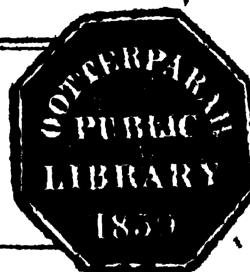
Francis Chute, Esquire, appointed *February* 14, 1735.

John Browne, Esquire, *February* 14, 1735.

William Noel, Esquire, *February* 6, 1737—8.

Thomas Sewell, Esquire, *April* 4, 1754.

Memorandum, That on *Monday* the 21st of *February* 1736, Lord HARDWICKE was appointed Lord High Chancellor of *Great Britain*, and on the *Thursday* following, sat in *Lincoln's Inn Hall*, to hold the first General Seal after *Hilary* term.



CAP. I.

Abatement and Revivor.

Vide title *Bill, under the Division, Supplemental Bill.*

CAP. II.

Account.

(1) *What shall be a good Bar to a Demand of a general one.*

Dawson v. *Dawson*.

Michaelmas term, 1737. Case 1.

Lord Chancellor. WHERE a bill is brought for a general account, and the defendant sets forth a stated one, the plaintiff must amend his bill (1): For the stated account is, *prima facie*, a bar, till particular errors are assigned to the stated account (2).

Where a defendant sets forth a stated account, it is a bar to a general one till particular errors are assigned.

To support a stated account it is not sufficient to say, that there has been a dividend, which implies an account stated, for a dividend may be made upon a supposition that the estate will amount to so much; but still subject to the account that may be taken afterwards.

It is not sufficient, to maintain a stated account, to alledge there has been a dividend made between the parties.

(1) See *Sumner* v. *Thorpe*, *post* 2 vol. 1. *Willis* v. *Jernegan*, *ibid.* 251. *Burk* v. *Brown*, *ibid.* 399. *Hankey* v. *Simpson*, *post* 3 vol. 303.

(2) In a bill to open a settled account, particular or specific errors must be shewn. *Taylor* v. *Haylin*, 2 *Bro. Cha. Rep.* 310. *Johnson* v. *Curtis*, 3 *Bro. Cha. Rep.* 266. As to the length of time permitted by the Courts to bar the opening of accounts, see *post* 2 vol. 113. and note.

CAP. III.

Ademption.

Vide title *Legacies*.

C A P. IV.

Admission.

Vide title *Bill*, *under the Division*, *Bills of Discovery*, &c.

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[2].

C A P. V.

Advowson.

Vide title *Trust and Trustees*, *under the Division*, *Resulting Trusts*, *and Trusts by Implication*.

C A P. VI.

Agreements, Articles, and Covenants.

(A) *Agreements and Covenants which ought to be performed in specie.*

(B) *Parol Agreements, or such as are within the Statute of Frauds and Perjuries.*

(C) *Voluntary Agreements, in what Cases to be performed.*

(D) *Concerning the Manner of performing Agreements.*

(A) *Agreements and Covenants which ought to be performed in specie.*

August the 2d; 1739. *Henry Stapilton* an Infant, by *Ann* his Mother — Plaintiff.
Philip Stapilton and others ——— Defendants.

Case 2

BY a deed dated on the 21st of *August*, 1661, *Philip Stapilton* was tenant of the premisses in question for 99 years, if he so long live, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to his right heirs.

Philip Stapilton tenant of the premisses in question for 99 years, if he so long lived, remainder to his first and other sons in tail, remainder to his right heirs, having two sons, *Henry* and *Philip*, they by lease and release of the 9th and 10th *Sept.* 1724, in order to settle and perpetuate the manors, *&c.* in the name and blood of the *Stapiltons*, and for making provision for his [illegible] and for [illegible]nting disputes that might possibly arise between them or any other person claiming [illegible] interest in [illegible] estates, and for barring all estates tail, release and confirm to two trustees all those [illegible]nors, *&c.* to hold to them and their heirs, (as to part) to the use of *Philip* the father, his heirs and assigns for ever, and (as to another part) to the use of the father for life, to *Henry* the son for life, remainder to trustees for preserving, *&c.* remainder to his first and every other son in tail male, remainder to *Philip* the son for life, with like remainders to the daughters of *Henry* in tail, remainder to the daughters of *Philip* the son in tail, remainder to the right heirs of *Philip* the father. And as to the other part, to the use of *Philip* the father for life, remainder to *Philip* the son for life, *&c.*

Philip

Stapilton v. Stapilton.

Philip having two sons, *Henry* and *Philip*, they by deeds of lease and release the 9th and 10th of *Sept.* 1724, reciting, that for settling and perpetuating all manors, &c. in the name and blood of the *Stapiltons*, and for making provision for his two sons, &c. for preventing disputes and controversies that might possibly arise between the said two sons, or any other person claiming an interest in all or any of the estates therein after mentioned, and for barring all estates tail, and for answering all and every the purpose and purposes of the parties thereto, and for and in consideration of the sum of 5*s.* release and confirm to *Thompson* and *Fairfax* all those manors, &c. To have and to hold to them, their heirs and assigns, to the use (as to part) of *Philip* the father, his heirs and assigns for ever, and as to another part, to the use of *Philip* the father for life, remainder to *Henry* the son for life, remainder to trustees to preserve contingent remainders, remainder to his first and every other son in tail male, remainder to *Philip* the son for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to the daughters of *Henry* in tail, remainder to the daughters of *Philip* the son in tail, remainder to the right heirs of *Philip* the father. And as to the remaining part, to the use of *Philip* the father for life, with like limitations in the first place to *Philip* the son and his issue, and then to *Henry* and his issue, remainder in fee to the father.

There were covenants to suffer a recovery within 12 months, and likewise for farther assurances.—*N. B.* To this deed, the heir of the surviving trustee in the deed in 1661 was not a party.

But by deeds of lease and release dated the 28th and 29th of *Sept.* 1724. to which the heir of the surviving trustee of the deed of 1661 was a party, the father and two sons make *Thompson* and *Fairfax* tenants to the præcipe, in order to suffer a recovery for the purposes mentioned in the former deeds of the 9th and 10th of *Sept.*

Before any recovery suffered *Henry* died, leaving issue the plaintiff.

By lease and release 28th and 29th of *Sept.* 1724, the father and two sons make *Thompson* and *Fairfax* tenants to the præcipe, in order to suffer a recovery for the purposes mentioned in the former deed: Before any recovery suffered *Henry* died, leaving issue the plaintiff.

Afterwards, by lease and release the 12th and 13th of *Apr.* 1725, to which the heir of the surviving trustee of the deed of 1661 was a party, *Philip* the father and *Philip* the son covenant to suffer a recovery, in which *Thompson* and *Fairfax* were to be tenants to the præcipe, to the use, as to part, of *Philip* the father, his heirs and assigns; and as to the other part, to the use of *Philip* the father for life, remainder to *Philip* the son in fee.

Afterwards, by lease and release, 12th and 13th of *April* 1725, *Philip* the father and *Philip* the son covenant to suffer a recovery, in which *Thompson* and *Fairfax*, were to be tenants to the præcipe, to the use, as to part, of *Philip* the father and his heirs; and as to the other part, to the use of *Philip* the father for life, remainder to *Philip* the son in fee.

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In Trinity term 1725, a recovery was suffered, which were the same tenants to the præcipe, the same demandants and the same vouchees (except *Henry* who was dead), as were covenanted by the first deed, and within 12 months after this deed.

In *Trinity* term 1725. a recovery was suffered, in which were the same tenant to the præcipe, the same demandant, and the same vouchees (except *Henry* who was dead), as were covenanted to be by the first deed; it was likewise suffered within twelve months after the first deed.

The father being dead, the plaintiff, as son and heir of *Henry*, brought this bill to establish his title to the premisses in question, and for the whole estate as tenant in tail under an old settlement.

The father *Philip Stapilton* being dead, the plaintiff, as son and heir of *Henry*, brought his bill to establish his title to the premisses in question, and for the whole estate as tenant in tail under the old settlement, and to be let into possession, and for an account of rents received by *Philip Stapilton* the son, due since the death of the plaintiff's grandfather, and to have the same applied for the plaintiff's benefit during his infancy, and for an injunction to restrain the defendants from receiving any more rents.

The defendant *Philip* the son insisted *Henry* was a bastard, and, that by the deed of 1725, and the recovery, he was intitled to the whole estate. *Henry* upon an issue found illegitimate, and the cause came on now on the equity reserved.

The defendant, *Philip* the son by his answer confesses the several deeds before-mentioned, but says, *Henry* was a bastard, and that by virtue of the deed of 1725, and of the recovery, he was intitled to the whole estate in question.

Upon an issue directed, *Henry* was found illegitimate, and the cause was now heard upon the equity reserved, when the counsel for the plaintiff, waiving the claim to the whole estate, insisted upon these two points.

The plaintiff is intitled to the lands limited in remainder to his father, by the deeds of the 9th and 10th of *Sept.* 1724, according to the uses therein, notwithstanding the illegitimacy of his father; a court of equity being desirous of laying hold of any just grounds to carry agreements into execution, made to establish the peace of a family.

1st, That the recovery suffered in *Trinity* term 1725 should enure to the use of the deeds of the 9th and 10th of *Sept.* 1724, and not to the uses of the deed in 1725.

2dly, Supposing it did not, yet that the deed of 1724 was such an agreement, as this court will carry into execution.

[illegible]k. 619. [illegible] 18. 8. C. Cro. Jac. 688. Sir W. Jones 60. 8. C.

As to the first point; It was said that the uses when once declared cannot be altered, unless all the parties intitled to the uses join in the new declaration, and *Henry* did not join in the deed of 1725. Tenant in tail may part with his estate, and it shall be good against him, tho' not against his issue. For tenant in tail is not aided by the statute of *Westminster* the 2d, but only his issue, therefore by the deed of 1724, the uses being executed by the statute of *H.* 8. *Henry* gained a base fee which is not avoidable by *Philip* during his life, and as his issue are barred by the subsequent recovery, they will not be able to avoid it, and consequently *Henry*'s estate which was before defeasible is made indefeasible by the recovery.

If tenant in tail confesses a judgment, or mortgages the lands, and afterwards suffers a recovery to a collateral purpose, that recovery shall enure to make good all his precedent acts and incumbrances. 1 *Ch. Cas.* 119. (*Lord Chancellor* mentioned a case in lord *King*'s time, where father tenant in tail, remainder to himself in fee, contracting debts on specialty, his son after his death levying a fine let in his father's creditors) (1). And if a recovery suffered for another purpose will substantiate any prior act of the tenant in tail, much more, in this case, this recovery will substantiate the first deed, where there are all the parties who covenanted by that deed. STAPILTON v. STAPILTON.

As to the second point; this cannot be considered as a voluntary agreement, for *Henry*'s legitimacy was then doubtful, and if he had proved legitimate, *Philip* would have come into this court to have the agreement executed, and *Henry* would have been bound by it. This court has decreed the performance of agreements like this founded upon mistakes; as in the cases of *Frank* v. *Frank*, 1 *Ch. Cas.* 84. and *Cann* v. *Cann*, 1 *Will.* 723.

For the defendant it was argued, as to the first point, that *Henry* being dead before the recovery was suffered, the intent of the parties, in the first deed, could not be pursued; for the plaintiff (supposing him legitimate) claims paramount his father, and the deed of 1661, therefore as the recovery could not substantiate the first deed; supposing him legitimate, it shall not substantiate it, now he is found illegitimate.

The plaintiff upon the death of his father had not any use vested in him, for the intent of the parties was, that the uses should arise out of the recovery; the ends recited could not be come at without a recovery, and where the intent of the parties is, that the uses should pass by fine or recovery, nothing will pass by the deed, that is intended only to declare the uses; the fine and recovery all make but one conveyance. *Cro. Jac.* 643. 2 *Ro. Rep.* 68. 2 *Lev.* 306. 1 *Vent.* 279. 2 *Lev.* 54. *Cromwell*'s case. 2 *Co.* 69. *b. Cro. Jac.* 320.

As to the second point; take it as an agreement, this court will not decree a performance of it, for supposing *Henry* had been found legitimate, this court would not have decreed a performance of it against the plaintiff; so that, in regard to the defendant, it must be considered as a voluntary agreement, into which he was drawn without any valuable consideration, and the covenant for further assurance will be void as the deed itself to which it is annexed is void; and so it was determined in the case of *Furzaker* v. *Robinson*, *Prec. in Chan.* 475.

(1) See the case of *Symonds* v. *Cudmore*, 1 *Salk.* 338. 1 *Show.* 370. 4 *Mod.* 1. *Carthew* 257. and Earl of *Shelburne* v. *Biddulph*, 4 *Bro. Par. Ca.* 594.

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Where agreements are entred into to save the honour of a family, and are reasonable ones, a court of equity will, if possible, decree a performance.

Lord Chancellor. The plaintiff in this case is intitled to have a decree; there was a sufficient foundation for *Philip* the father, and *Henry* and *Philip* his two sons, to execute the lease and release of the 9th and 10th of *Sept.* 1724. It was to save the honour of the father and his family, and was a reasonable agreement, and therefore if it is possible for a court of equity to decree a performance of it, it ought to be done.

[*6] *It would be very hard for the defendant on his side, to endeavour to set aside this agreement, and the effect of this deed. Consider the state and situation of the family at the time of making the agreement: *Philip* had these children grown up, had a very considerable real estate, both his sons then owned as legitimate, their father and mother had lived together as husband and wife for many years, and at the time of this agreement were so; there was a foresight in the father and mother, that such a dispute between their two sons might hereafter arise, to their dishonour and likewise that of the family.

The foundation of this agreement, the illegitimacy of the eldest son *Henry*, has now been determined by trial, and it is found that *Henry* was a bastard, yet both the sons are of the same blood of the father equally, though not so in the notion of the law.

If the elder son should be found illegitimate (as he now is), the father knew he would be left without any provision if no such agreement was made; and on the other hand, if his legitimacy should be established, then *Philip* the younger son would have nothing: to prevent these disputes, and ill consequences, the father brings both his sons into an agreement to make a division of his real estate. It is very plain the parties did not know who was the heir of the surviving trustee, in the settlement of 1661, at the time of the lease and release the 9th and 10th of *Sept.* 1724; because they covenant a writ of entry should be sued out within 12 months, which is a very unusual time to limit to suffer a recovery, and done in order to give time to find out the heir of the surviving trustee, if they could find him out; but he was afterwards found and made a party to the deeds of the 28th and 29th of *Sept.* 1724.

The bill is brought by the eldest son and heir of *Henry*, to have the benefit and possession of the whole estate, and to have an account of the rents and profits, and to be quieted in the possession, and for general relief. Upon the first hearing an issue was directed to try whether *Henry* the father was legitimate, and found he was not, and now the plaintiff insists upon having the benefit of this agreement, whereby he is only intitled to a part: this being the bill of an infant, he may have a decree upon any matter arising upon the state of his case, though he has not particularly mentioned and insisted upon it, and

An infant may have a decree upon any matter arising on the state of his case, though not particularly prayed by his bill.

and prayed it by his bill; but it might be otherwise in the case of an adult person (1). STAPILTON v. STAPILTON.

Upon this case there arise two general questions.

First, Whether the plaintiff has any estate in law by virtue of any of the conveyances, or by the recovery?

Secondly, If he has no estate at law, or only a defeasible one, whether he is intitled to have the benefit of this agreement, and to have it carried into execution here?

The first question consists of two branches.

First, Whether the lease and release of the 9th and 10th of *Sept.* 1724, will amount to a good declaration of the uses of the recovery, notwithstanding the subsequent deed of *April* 1725? [7]

Secondly, If not, whether the recovery of *Trinity* term 1725, having barred the estate tail, will make good any estate which passed by the lease and release of the 9th and 10th of *September* 1724?

As to the first; whether *the lease and release* is a good declaration of the uses of the recovery, I am strongly inclined to think it will amount to a good declaration: this question depends on the construction of law, and the authority of cases upon the declaration of uses. It is true, where there is an agreement to suffer a recovery, and uses are declared, if the recovery is after suffered, though it varies in point of time from the recovery covenanted to be suffered, yet if there is no subsequent declaration of uses, the recovery will enure to the uses so declared (2).

Where there is an agreement to suffer a recovery, and uses are declared, tho' it is suffered at a different time from the recovery covenanted to be suffered, yet if no subsequent declaration of uses, it will enure to the uses so declared.

And before the statute of frauds, if the deeds declaring the uses had not been pursued, a parol declaration of uses would have been let in; but if there is a deed declaring the uses, and the common recovery is suffered accordingly, that would, before the statute, exclude a parol declaration of new uses (3).

But even now there may be a subsequent declaration of uses, but that declaration must be in writing, and such a new declaration of uses depends upon the agreement of the parties; therefore, though it is said at the bar, that the declaration of uses is

Where there is a deed to lead the uses of a recovery, it is not in the power of tenant in tail to declare new uses, but such subsequent declaration must be by all the parties concerned in interest.

The expression in the countess of *Rutland*'s case. 5 *Co.* that whilst it is directory only, new uses may be declared, means that as the uses must arise out of the agreement of the parties, they by mutual consent may change the uses.

(1) See *post* 2 vol. 141. *Grimes* v. *French*.

(2) See *Havergil* and *Hare*, 2 *Roll. Abr.* 799.

(3) Countess of *Rutland*'s case, 5 *Co.* 25. *a. b.* *Downman*'s case, 9 *Co.* 10. *b.*

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in the power of the tenant in tail, and that he may declare new uses; I take that not to be law, for such subsequent declaration must be by all the parties, concerned in interest; and in the case of the countess of *Rutland*, 5 *Co.* 25. it is not laid down there, that the tenant in tail might declare new uses, but said, *whilst it is directory only*, new uses may be declared, and the meaning of that is, that as the uses must arise out of the agreement of the parties, the parties may change the uses (1), but that must be done by the mutual consent of all the parties concerned in interest, and in that case it was a mutual agreement of all parties (2).

And in the case of *Jones* v. *Morley*, 2 *Salk.* 677. There was a variance as to the time of suffering the recovery, from the deed declaring the uses, and there held that a declaration of uses was equally good, whether by deed or not, if in writing.

But in the present case, the second agreement not being between all the parties concerned in interest, ought not to control the first declaration, and especially as this recovery was suffered within the time prescribed by the first deed, and between the same demandant and tenant.

[8] The consideration for suffering the recovery was good both in law and equity, and there is no case to warrant me to say, the first agreement is not good and binding, or that the tenant in tail could by his own agreement afterwards change the uses.

But if it was doubtful whether the recovery suffered in 1725 should enure to the uses declared by the deed of 1724, I am of opinion the recovery will operate to make good those estates which passed by the deed of 1724.

But to this two objections have been made.

First, That the uses must be governed by, and operate according to the intention of the parties, therefore the subsequent recovery being suffered to other uses, those uses will take place.

Secondly, If any uses did pass by the deed in 1724, yet this recovery will not make those uses good, because the subsequent recovery was suffered to particular uses declared by the deed of 1725.

Where a court of law or equity find that the general and substantial intent of the parties was, that the estate should pass, they will construe deeds in support of that intention, different from the formal nature of those deeds themselves.

As to the first objection. I am of opinion that a use did pass by the deed of 1724, and according to the intention of the parties. It is certainly true, that, according to the statute of uses, the general doctrine is, that the uses shall be executed according to the intention of the parties, but both the courts of law and equity consider what was the general and final intent of the parties. In this case, their intention was, that the estate should

(1) See second resolution in *Jones* v. *Morley*, 2 *Salk.* 677. S. C. *Comb.* 429.

(2) See *Durnford* v. *Lane*, 1 *Bro. Chan. Ca.* 106.

pass,

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pass, and wherever a court of law or equity find that the general and substantial intent of the parties, was that the estate should pass, they will construe deeds in support of that intention, different from the formal nature of those deeds themselves; as a feoffment, to serve the intention of the parties, shall operate as a covenant to stand seised (1). The intent here was, that the estate in point of law should pass by the deed of 1724, and that the uses declared by that deed should vest in the mean time till the recovery suffered.

This is an answer to the objection arising from the statute of uses; but there is another question, what estate passed by the deed of 1724?

It was a defeasible estate to serve the uses of that deed, and so is the resolution in *Machell* v. *Clark* in *Farr*. 18. *Salk*. 619. (2). That tenant in tail may convey a base fee and estate defeasible by the entry of the issue.

The next question is, Whether the recovery suffered in 1725 did enure to make good, and render indefeasible those base estates created by the deed of 1724?

And I am of opinion they are made good.

The objection to this is, That the recovery was suffered in pursuance of the deed in 1725, wherein there were new uses limited, but the only uses which make any difference in that deed are to *Philip* the son and his heirs, so there is nobody concerned in the question but *Philip* and his heirs.

[9]

It has been argued by defendant's counsel, that, if the first declaration of uses is in general to prevail, purchasers of estates, though they have a recovery for strengthening their title, with a declaration of the uses of the recovery to themselves and their heirs, cannot be safe, for the *vendor* may defeat such declaration by a precedent one to different uses; but in such cases I think a recovery would not enure to make good such former declaration of uses, but only the uses of the purchase.

Where there is a recovery for strengthening the title of a purchaser, with a declaration of the uses to him and his heirs, notwithstanding a precedent one to different uses, it will not enure to make good such former declaration, but the uses of the purchase only.

It is admitted, that if tenant in tail confesses a judgment, or a statute, or enters into a bond, and afterwards suffers a recovery to bar the estate tail, it lets in the precedent judgment, &c. And it is as clear, if a tenant in tail makes a lease not warranted by the statute of the 32 *Hen*. 8. if he suffers a recovery, that lets in the lease and makes it good (3). There are so many cases of this kind, that it is not necessary for me to mention them.

If tenant in tail makes a lease not warranted by the statute, and suffers a recovery, it lets in the lease and makes it good; the same as to a judgment, statute or bond.

This case is different from those that turn only upon the point of the effect of a mere declaration of uses; for a mere declaration of uses subsists only upon the agreement of the parties,

(1) See *Crossing* v. *Scudamore*, 1 *Vent*. 137.

(2) *Cam*. 119. S. C.

(3) See *Capel's* case, 1 *Co*. 62. a. *Chomley's* case, 2 *Co*. 52. b. *Beck* on dem. *Hawkins* v. *Welsh*, 1 *Wils*. 277.

and

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and in such cases, where the agreement has been changed by mutual assent of all parties, there a recovery shall enure to make good such last agreement or declaration.

The issue of tenant in tail by virtue of the statute *de donis* may avoid a prior lease, charge or estate made by such tenant, but not he himself; but when by the recovery he has gained a fee, the issue being barred, all the reasoning for their avoiding estates, &c. made by him ceases.

But if the estate was vested, notwithstanding such declaration of uses, yet the recovery has always been held to make good such defeasible estate (1); for the prior lease, charge or estate made by tenant in tail is only defeasible by the issue, by virtue of the statute *de donis*, which was made to protect the issue against the alienation of the tenant in tail; therefore the issue would avoid such lease, *&c.* but not the tenant in tail himself; but when by the recovery he has gained to himself a fee, all the reasoning for avoiding an estate made by tenant in tail is gone, for the issue is barred by the recovery. The reason why the issue may avoid a charge made by tenant in tail, is upon account of the protection of the issue and his estate under the statute *de donis*, and of the privity of the estate tail; but when the privity is gone, the reason ceases, and to this purpose is the case of *Croker* v. *Kelsey*, Sir *W. Jones* 60.

Where a tenant in tail suffers a recovery, he by construction of law is in of the old use, and the estate is discharged of the statute *de donis*.

In the case of Lord *Derwentwater*, *Mod. Cases in Law and Equity*, 172. *2d part*, the question was, Whether a papist, tenant in tail, suffering a recovery and declaring the uses to himself in fee, gained a new estate within the 11th and 12th of *Will.* 3. or was in of the old use? And it was held the 5th of *Geo.* 1. by four judges out of five, appointed delegates to determine appeals from the commissioners of forfeited estates, that he was in of the old use; and I take it for law, that a tenant in tail suffering a recovery is in of the old use, and that the estate is discharged of the statute *de donis* (2), and therefore I am of opinion that the recovery has made good this defeasible estate created by the deed of 1724.

[10]

It has been objected, that if the plaintiff has any title, his remedy is at law, but I think it is more properly here; he is an infant, and has come recently into this court, nor do I think this case depends intirely upon the point of law; for I am of opinion that the plaintiff is intitled to have an execution of the agreement, as a good and binding agreement in this court.

Where a valuable consideration for an agreement on all sides, there is a sufficient ground to come into a court of equity, but a mere volunteer not entitled to come here for an execution of an agreement.

The question is, Whether there was any valuable consideration on all sides for entring into this agreement? If so, then there is a sufficient ground for coming here; but a mere volunteer is not intitled to come here for an execution of an agreement;

(1) See *Goodright* v. *Mead*, 3 *Burr.* 1703. *Cheney* v. *Hall*, *Amb.* 526. *Moody* v. *Moody*, *Amb.* 649.

(2) *Vide Martin* ex dem. *Tregonwell*, v. *Strachan*, 2 *Stra.* 1179. 1 *Wilson* 66. S. C. 4 *Bro. Par. Ca.* 486. 5 *Term Rep.* 107. S. C. *Roe* dem. *Crowe*, v. *Baldwere*, 5 *Term Rep.* 104. And see (as in some measure connected with this point), the case of *Hill* v. *Broughton*, 3 *Bro. Cha. Ca.* 180.

ment; but here is a proper consideration as appears in the recital of the deed of 1724; neither is it the common case of a bastard, for the law of *England* does allow of some privileges to a bastard *eigne*, and their parents are not punishable by the canon law for antenuptial fornication. STAPILTON v. STAPILTON.

In the case of *Cann* v. *Cann* (1), it was laid down by lord *Macclesfield*, that an agreement entred into upon a supposition of a right, or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties, for the right must always be on one side or the other; and therefore the compromise of a doubtful right, is a sufficient foundation of an agreement (2).

An agreement upon a supposition of a right, though it may afterwards come out on the other side, is binding, and shall not prevail against the agreement of the parties.

Another objection has been made to this agreement, that the benefit on *Henry* and *Philip*'s side was not mutual and equal.

During both their lives, the benefit and obligation was mutual, and *Henry* would have been equally compellable to suffer a recovery with *Philip*.

But it is said, that an alteration as to their mutual benefit has happened by the death of *Henry*, and it is said, that if *Henry* had been legitimate the plaintiff would not have been compellable to suffer a recovery, because the issue in tail is not compellable to perform the covenants of his ancestor the tenant in tail (3).

But here the chance was at first equal, and it is hard to say, that the act of God should hinder the agreement from being carried into execution; the chance was equal, who died first, *Henry* or *Philip*: if *Henry* had been legitimate, and *Philip* had died in *Henry*'s life, leaving children, I am of opinion *Philip*'s son would have been intitled to have come against *Henry* for an execution of the agreement; and therefore the chance was at first equal on both sides, and we are not to consider how the event has happened.

Another objection has been taken, that the father made use of his coercive power over *Philip* to force him into this agreement, and it is said equity does not favour agreements made by compulsion.

But this court always considers the reasonableness of the agreement (4): besides here is no proof of compulsion by the father; if there was any compulsion, it seems rather to have been made use of against *Henry*, who was then esteemed his eldest son, and considering the consequence of setting aside this agreement, a [11]

(1) 1 *P. W.* 727. S. C.

(2) See *Chesterfield* v. *Janson*, *post* 354. *Pullen* v. *Ready*, *post* 2 vol. 592. *Corry* v. *Corry*, 1 *Ves.* 19. *Cole* v. *Gibson*, *ibid.* 506. *Ballard* v. *Crowe*, 3 *Bro. Cha. Rep.* 117.

(3) See Mr. *Savill*'s case cited 1 *Ves.* 224. 2 *Ves.* 634. 662. *Ha*[illegible]*d* v. *Stillingfleet*, *post.* 322.

(4) See *Blundel* v. *Barker*, 1 *P. W.* 639. *Corry* v. *Corry*, 1 *Ves* 19. *Kinchant* v. *Kinchant*, 1 *Bro. Cha. Ca.* 369.

court

STAPILTON v. STAPILTON.

court of equity will be glad to lay hold of any just ground to carry it into execution, and to establish the peace of a family.

His lordship therefore declared, that the plaintiff is intitled to the lands and premisses limited in remainder, to the first son of *Henry Stapilton*, his father, by the deeds of the 9th and 10th of *September* 1724, according to the uses therein, and to the benefit of the covenants in those deeds, and decreed the defendant *Philip* to come to an account for the rents of the said premisses, and declared that *Philip* was intitled to hold the lands limited by the deeds of the 9th and 10th of *September* 1724, to *Philip* the elder for life, with a remainder to the defendant for life, against the plaintiff and his heirs, and that the defendant should make further assurance to the plaintiff of his part, and the plaintiff the like assurance to the defendant of his part, and no costs on either side (1).

(1) *Reg. Lib.* B. 1738. *fol.* 446.

June the 2d. 1749

Collet v. *Collet*.

Case 3.

By a settlement before marriage, securities for money belonging to the wife were assigned to a trustee, to be laid out in the purchase of freehold lands, and settled among other uses, to the first son in tail male, with like remainders to the second and other sons, remainder to the heirs female in tail. The father and mother die, leaving the *plaintiff*, two other sons and four daughters. The eldest son now prays by his bill, that the securities may be assigned to him, being tenant in tail and not laid out in land.

BY a settlement made previous to the marriage of the plaintiff's mother, several securities for money belonging to her were assigned to a trustee, in trust within one year after the date of the settlement, or as soon as conveniently might be after the marriage, to be laid out in the purchase of a freehold estate in lands or houses, to be settled to the use of the husband for life, to the wife for life, and *to the first son of the marriage, and the heirs male of the body of such first son*, with like remainders to the second and other sons of the said marriage, remainder to the heirs female of the marriage in tail.

The father and mother died, leaving the plaintiff, two other sons and four daughters. The money in the said securities were never invested in any freehold land of inheritance, nor were any of the securities changed, except only 1000 *l.* which was invested in a purchase of a moiety of two houses by the consent of the plaintiff's mother, and settled to the uses mentioned in the settlement; and now the eldest son being tenant in tail prayed by his bill that the remainder of the said securities might be assigned to him, and not laid out, because, if lands were purchased and settled, he could, as tenant in tail, bar all the remainders over.

Lord

Lord Chancellor: The court is to execute the trust, and the way to carry it into execution is to order the money to be laid out in land, and since the case of *Colwell* v. *Shadwell* before Lord *Cowper*, it has been the constant rule of the court to give the remainder-man his chance (1). But, on the brothers and sisters of the plaintiff, who were in remainder, appearing in court and consenting, his Lordship ordered that the securities, not already invested in land, be assigned to the plaintiff, and that the representative of the trustee do transfer them to the plaintiff to his own use, and pay him also the interest of such securities.

COLLET v. COLLET.

The constant rule of the court is to order the money to be laid out in land, to give the remainder-man his chance. But the brothers and sisters in this case appearing in court and consenting, the representative of the trustee directed to transfer the securities to the plaintiff's own use, and pay him the interest likewise.

(1) So *Short* v. *Wood*, 1 *P. W.* 470. *Chaplin* v. *Horner*, *ibid.* 483. and the case of ——— v. *Marsh* in note, *ibid.* 485. *Cunningham* v. *Moody*, 1 *Vef.* 176. *Calthorpe* v. *Gough*, 4 *Durn.* & *East* 707. *Sed secus* where the reversion in fee is in the tenant in tail himself, and see *Benson* v. *Benson*, 1 *P. W.* 131. *Edwards* v. Countess of *Warwick*, 2 *P. W.* 173. *Trafford* v. *Boehm*, *post.* 3 vol. 447. *Cunningham* v. *Moody*, 1 *Vef.* 176. *Ex parte King*, 2 *Bro. Cha. Rep.* 160. *Contra Eyres*'s case, 3 *P. W.* 13.

Hil. term 1737, Jan. 31.

Gibson v. *Patterson* and Others.

Case 4.

Though the vendor of an estate does not produce his deeds, or tender a conveyance within the time limited by the articles, the court does not regard this neglect, but will decree a sale notwithstanding.

A Bill brought for a specifick performance of articles of agreement for sale of an estate, and decreed in favour of the plaintiff, the vendor, without any regard had to the plaintiff's negligence in not producing his title deeds (1), &c. and not tendring a conveyance *within the time* (2) limited for that purpose

(1) In 4 *Bro. Cha. Rep.* 332. it is said by the Lord Chancellor "*that the vendor could not bring an action against the vendee without having tendered him a conveyance.*"

(2) In *Lloyd* v. *Collet*, cited *infra*, Lord *Loughborough* observed, it appeared from Lord *Hardwicke*'s notes of the above case of *Gibson* v. *Patterson*, that upon an application being made in that case *within the time* by the plaintiff to the defendant to perform his agreement, the latter said he would not; but would go into *Scotland* to avoid being compelled so to do. It also appears from the bill as stated in the Register's book, that the defendant had *agreed* to let part of the lands to the plaintiff. The defendant in his answer says, that he had made frequent applications within the time limited for the completion of his purchase to the plaintiff, in order to have the title deeds or copies thereof produced, but that the plaintiff had neglected so to do. It is also observable, that the lands were *in mortgage*; and therefore the title deeds were probably in the mortgagee's possession: but the mortgagee in his answer said, that he then was, and always had been ready to join in the sale. *Reg. Lib. A.* 1737. fol. 322. In *Pincke* v. *Curtis*, 4 *Bro. Cha. Rep.* 329. a specific performance was decreed, though the abstract was not delivered till near three weeks after the expiration of the time appointed for the completion of the purchase. But in *Keen* v. *Stukley*, *Gilb. Rep.* 155. a specific performance was refused after the time limited by the articles. The case of *Lloyd* and *Young* v. *Collett*, 25th *November*, 1793, was thus; The plaintiff *Young* on the 2d *May*, 1792, caused printed particulars and conditions of sale of the ground rents in question to be delivered, and on that day the premisses were put up to be sold by public auction: but they were not then sold. The defendant on the 10th of *August* 1792 agreed, by writing indorsed on one of the printed particulars to purchase the premisses for 2609*l.* 17*s.* and the purchase was to be completed on or before the 25th of *March*, 1793; and *Collett* paid the plaintiff *Young*, the auctioneer, 100*l.* as a deposit. On the 6th of *November*, 1793, the plaintiffs filed their bill against the defendant for a specific performance of the agreement, and for an injunction to restrain *Collett* from proceeding at law in the action, which he had brought for the deposit. On the 16th of *November*, 1793, the defendant put in his answer, stating the following facts, which as far as they related to the conduct of the vendor and purchaser could not be controverted. He admitted the agreement; but said, that he had frequently between the 10th of *August*, 1792, and the 25th of *March*, 1793, applied to *Young*, to his clerk, and to Mr. *Woodcock*, the plaintiff's solicitor for an abstract of the title: but he could obtain no abstract relating thereto. That *shortly after* the 25th of *March*, 1793, he applied to *Young* for his deposit with interest from 10th of *August*, 1792. That *Young* having desired him to write a letter to him, which he might shew to *Woodcock*, the defendant 4th *April*, 1793, wrote a letter to *Young*, insisting upon his deposit; that he repeatedly applied for his deposit

purpose by the articles; Lord Chancellor saying, most of the cases which were brought in this court relating to the execution of articles for sale of an estate were of the same kind, and liable to this objection, but thought there was nothing in the objection.

GIBSON v. PATTERSON.

His Lordship decreed the articles to be performed and referred to a Master to see if a good title could be made by the plaintiff of the premisses in question, and in case a good title could be made, then the defendant to pay plaintiff's costs to be taxed.

deposit between 4th of *April* and 10th of *June* 1793, when he brought his action: that no abstract was delivered or left with him till the 16th of *September*, 1793, at which time he was out of town. On the 25th of *October*, the defendant upon his return to town wrote a letter to *Woodcock*, insisting, that he would not complete his purchase. He stated by his answer the value of the ground rents, and the value of the government long annuities at the time he entered into the agreement, and on the 16th of *September*, 1793; and from thence he inferred, that the value of the ground rents was diminished 560*l.* and upwards. That if he had been furnished with the abstract in due time, he believed he could have re sold the ground rents to advantage.

A motion was now made for an injunction to restrain the defendant from proceeding at law, and that such injunction might extend to stay trial. In support of the motion it was urged, that lapse of time was not regarded in a court of equity. That it was an established principle, that such an agreement ought to be performed; and that the delay in this case was not equal to that which had occurred in many other cases, in which agreements had been decreed to be performed; although it was morally certain that much greater delay must happen, than had happened or could happen in the present case. The counsel cited the case of *Pincke* v. *Curtis*, *supra*, and the cases there cited.

The Lord Chancellor considered the conduct of the vendor as evidence of an abandonment of his contract, and refused the motion.

(B) *Parol Agreements, or such as are within the Statute of Frauds and Perjuries.*

Hil. term 1737, Feb. 8.

Clerk v. *Wright.*

Case 5.

A. agrees for the purchase of an estate, but the agreement not reduced into writing; though A. in confidence thereof gave orders for conveyances to be drawn, and went several times to view the estate, this court will not carry such agreement into execution, and the statute of frauds may be pleaded to a bill brought for that purpose.

THE plaintiff had agreed for the purchase of an estate of the defendant, but the agreement was not reduced into writing; however, in confidence of the agreement, plaintiff had given orders for conveyances to be drawn and engrossed, and went several times to view the estate: some time after the defendant sent a letter to the plaintiff, informing him, that at the *time he contracted for the sale of the estate, the value of the timber was not known to him, and that the plaintiff should not have the estate unless he would give him a larger price.

[*13]

The bill was brought to carry the agreement into execution, to which the statute of frauds afterwards was pleaded.

A letter is not a sufficient evidence of the agreement, unless the terms of the agreement are mentioned therein, but where a man takes possession in pursuance of an agreement, the court will decree an execution of it.

Lord Chancellor allowed the plea, and observed the letter could not be sufficient evidence of the agreement, the terms of the agreement not being therein mentioned (1). As to the objection that this agreement was in part performed, he allowed, that when a man takes possession in pursuance of an agreement (2), or does any act of the like nature, the court will decree an execution of it, but the circumstances only of giving directions for conveyances and going to take a view of the estate, he thought not sufficient (3).

(1) So *Seagood* v. *Neale*, 1 *Stra.* 426. *Cha. Prec.* 560. 2 *Eq. Ab.* 49. *pl.* 20. Viscountess *Montacute* v. *Maxwell*, 1 *P. W.* 618. 620. 1 *Stra.* 236. S. C. *Prec. Cha.* 526. S. C. But if the letter contains the terms of an agreement, or acknowledges or refers to a former written one, then it takes it out of the statute of frauds. See *Moore* v. *Hart*, 1 *Vern.* 110. 201. 2 *Cha. Rep.* 284. *Wankford* v. *Fotherly*, 2 *Vern.* 322. *Finch* v. *Earl of Winchelsea*, 1 *P. W.* 277. *Welford* v. *Beasely*, *post.* 3 vol. 503. 1 *Vef.* 8. *Allan* v. *Bower*, 3 *Bro. Cha. Rep.* 149. *Tawney* v. *Crowther*, *ibid.* 161. 318.

(2) *Lacon* v. *Mertins*, *post.* 3 vol. 4.

(3) See *Bawdes* v. *Amherst*, *Prec. Cha.* 402. *Hawkins* v. *Holmes*, 1 *P. W.* 770. & *Stokes* v. *Moore*, in note, *ibid.* 771.

(C) *Voluntary Agreements, in what Cases to be performed.*

Edward Russel, William Hayward, and others, Plaintiffs. November the 27th 1738.
Elizabeth Hammond, and others, —— Defendants.

Case 6.

A settlement after marriage in consideration of a portion paid by the wife's father good against creditors and not within the statute 13 *Eliz.*

THE bill was brought by the creditors of *William* and *German Hammond* deceased, for a discovery of their freehold, copyhold, and personal estates, and to be relieved against the several settlements of several parts of their freehold and leasehold estates, which were made after the marriage of *William Hammond* with the defendant *Elizabeth*, without consideration, and fraudulent with respect to the plaintiffs as creditors, and to have the freehold and leasehold sold, and to go in aid of the other estates of *William* and *German Hammond*, towards satisfaction of the plaintiff's demands.

The defendant *Elizabeth Hammond* insisted that about 1720 she intermarried with *William Hammond*, but such marriage being without the consent of *Thomas Stedman* her father, he then refused to give her any portion; but afterwards *William* and *German Hammond* his father, offering to make a settlement on her, *Thomas Stedman* agreed to pay 300*l.* as her fortune, and by indentures of lease and release of the 16th and 17th of *April* 1722, in consideration of 200*l.* a freehold estate was settled on *William* for life, with remainder to *Elizabeth* for life, with remainder to the first and other sons of the marriage, with remainders over, and by two other indentures dated respectively the said 17th of *April* 1722, in consideration of 100*l.* then paid or secured, several leasehold estates of *William Hammond* were settled in like manner. Since which *William Hammond* was dead intestate, leaving defendant and four children: that the 200*l.* was paid by her father on the execution of the settlements, and the remaining 100*l.* was paid soon afterwards. [14]

Upon the 25th of *February* 1734, this cause was heard before the Master of the Rolls, who decreed an account of the personal estate of *William Hammond*, and that the same should be applied in payment of what the Master should certify to be due to the plaintiffs, and all other the bond creditors of *William Hammond* in a course of administration. The same direction with regard to the personal estate of *German Hammond*. And if the personal estates were not sufficient to pay the plaintiffs and other bond creditors, then his Honor declared, that the settlement so made of the leasehold estates was fraudulent with respect to the creditors, and ought to be set aside; and that such part of the leasehold as was the proper estate of *German Hammond*, at the time of making the said settlements, should be applied in satisfaction of such of his bond creditors, as his personal estate should fall short of satisfying. The same di-

rections

Russel v. Hammond. rections with regard to *William Hammond*'s leasehold estates, as were his proper estate at the time of the settlements, and *Elizabeth Hammond* was to come to an account for the rents of the leasehold estates, and if there should not be sufficient to pay the bond creditors, then that a competent part of the leasehold estates of *German* and *William* be sold, and the money applied to pay the bond creditors, and ordered that the matter of the bill that sought to impeach the settlement of the freehold estate, and to make the same liable to the plaintiff's demands, should be dismissed without costs.

From which decree *Elizabeth Hammond* appealed, and insisted the decree ought to be rectified as to the account directed against her of the rents and profits of the leasehold estates; for that it appeared by the proofs in the cause, that the 200 *l.* was paid down in specie at the execution of the articles by the defendant's father, and that the 100 *l.* was afterwards paid by him to *William* and *German Hammond*, and therefore the settlement of the leasehold estates was not fraudulent, nor ought defendant to account for the rents and profits thereof, and for that by the said decree, the plaintiff's bill, so far as it sought relief against the settlement of the freehold, was dismissed without costs, notwithstanding the consideration was proved to have been paid, and for that she had possessed no part of the personal estate of *German* or *William*, and her answer was in no sort falsified; for which reasons the bill as against her ought in general to have been dismissed with costs, and therefore prayed the decree might be rectified in all such particulars.

Lord Chancellor: There is no evidence whatsoever in the cause to impeach the settlements of actual fraud.

But what the plaintiffs insist on, is, That *German Hammond* was largely indebted at the time of making the settlements on *William* the son, and that therefore these settlements were fraudulent upon the statute of the 13th of *Eliz. c.* 5. which regards creditors only.

[15] I must consider this act of parliament as it would have been considered at law, for I will not lay down any other rule of construction, in equity, than is followed at law upon this statute.

What is prayed by the creditors, is the application of these leasehold terms as assets for the satisfaction of their debts. The present is a case of general creditors, and not of mortgagees, judgment creditors or purchasers; and therefore not so strong, as where a man has paid his money for the same estate; which would have brought it within the statute of the 27 *Eliz. cap.* 4. which makes every conveyance made for the intent to defraud purchasers, for a good consideration, to be utterly void (1).

(1) See *Walker* v. *Burrows*, *post* 94.

There

There are three settlements in question, the first of a freehold estate, the second of a leasehold estate called *Ford*, and the third of another leasehold estate.

RUSSEL v. HAMMOND.

William Hammond the son married the daughter of one *Stedman* without the consent of the fathers of either side, no articles nor settlement were made before the marriage; Mr. *Stedman* afterwards proposed to *German Hammond* to give 300 *l.* as a portion with his daughter, if he would make an adequate settlement; afterwards a kind of survey was taken of the premisses proposed to be settled, and therefore the settlement was not merely colourable.

The consideration for settling the freehold is 200 *l.* paid; there is no pretence to impeach this, it is a fair transaction as can be (1).

The second is a settlement of the leasehold estate called *Ford*, made in consideration of the marriage already had, and for the consideration of 100 *l.* paid, or secured to be paid.

The question is, Whether this shall prevail against the creditors of *German* as a good settlement?

A great deal has been said upon this head, but it depends upon circumstances, and every case varies in that respect.

There are many opinions that every voluntary settlement is not fraudulent; what the judges mean is, that a settlement being voluntary is not for that reason fraudulent, but an evidence of fraud only. *Bevey's* case in 1 *Vent.* 193. 1 *Mod.* 119. Ld. *Tenham* v. *Mullins*. Though I have hardly known one case, where the person conveying was indebted at the time of the conveyance, that has not been deemed fraudulent; there are, to be sure, cases of voluntary settlements that are not fraudulent, and those are, where the person making, is not indebted at the time; in which case, subsequent debts will not shake such settlement (2).

A settlement being voluntary, is not for that reason fraudulent, but an evidence of fraud only, though hardly a case, where the person conveying was indebted at the time that it has not been deemed fraudulent.

A voluntary settlement is not fraudulent, where the person making it is not indebted at the time, nor will subsequent debts shake such settlement.

But I will not enter into a nice disquisition, Whether every voluntary settlement is, or is not, fraudulent? Because I think, as to the *Ford* estate, there was a valuable consideration, upon the face of the settlement, for the father was tenant for life, and the son intitled to the reversion in tail (3). [16]

And where father and son join in a marriage settlement, it is a bargain for a good and valuable consideration, and has been so held in several cases; but then the question is, Whether it has been extended to creditors.

(1) *Styleman* v. *Ashdown*, *post* 2 *vol.* 479.

(2) So *Shaw* v. Lady *Standish*, 2 *Vern.* 327. *Walker* v. *Burrows*, *post* 93. *Middlecome* v. *Marlow*, *post* 2 *vol.* 520. Lord *Townsend* v. *Wyndham*, 2 *Vej.* 10, 11. *Stephens* v. *Olive*, 2 *Bro. Cha. Rep.* 90. Secus if indebted at the time. *Beaumont* v. *Thorpe*, 1 *Vef.* 27. Or if there appear any badges of fraud to deceive creditors, as if a man make a settlement with a view to his being indebted at a future time. *Styleman* v. *Ashdown*, *post* 2 *vol.* 481. *Fitzer* v. *Fitzer*, *ibid.* 511. *Taylor* v. *Jones*, *ibid.* 600.

(3) This does not appear in the Register's Book. Indeed Lord *Hardwicke's* reasons respecting the *Ford* estate seem rather to apply to *freehold* than to *leasehold* property.

Russel v. Hammond.

In the present case, the son could not have settled the residuary interest, without the father's help, because he was tenant in tail in reversion, and not in possession; but if the father had been tenant for life, and the son tenant in fee, and had joined in such settlement, it would have made a material difference, for then I should have thought this good against creditors; for there was no occasion for the son's joining, as the son might have disposed of the residuary interest without him.

Where the father tenant for life, and son tenant in fee, join in a settlement, it is good against creditors, for the son might have disposed of the residuary interest without the father's joining.

I am of opinion besides, here is a fair pecuniary consideration, as there was a sum of money paid, amounting to 100 *l.* by *Stedman* to *German Hammond*, and, when paid, expressed to be on account of the third 100 *l.* agreed to be given by *Stedman* as a portion, and no other account appears to have passed between *Stedman* and *Hammond* but this.

As to the assignment of the other leasehold estate, it is of a very different nature; for it is expressed to be in consideration of the marriage, and divers other good considerations.

All the deeds bear date the same day, and it is insisted it is inartificial, to split them into three.

But I cannot think it is so here; for they have made the consideration of the freehold 200 *l.* and of the *Ford* estate 100 *l.* and I cannot take in the consideration of those deeds, which have a *quid pro quo*, and a consideration of their own, to support a third deed.

But in the last settlement is a plain badge of fraud, for *German Hammond* took back an annuity to himself and his wife for life of 27 *l.* which probably was the full value of the estate comprized in this deed, and therefore gave the son nothing (1); which is almost *tantamount* to a continuance in possession, and has always been deemed a strong circumstance of fraud (2).

Where a father takes back an annuity to the value of the estate comprized in the settlement, it is *tantamount* to a continuance in possession; and creditors will be relieved against such settlement.

Therefore I am of opinion the creditors ought to be relieved against this settlement.

The decree was made in *Feb.* 1734, very near four years ago, and if I should enter into the consideration of costs, I doubt I must give the plaintiff's costs before the Master, and though the bill, as to two of the matters, has no foundation for relief, yet as to a third part, *viz.* the last settlement, it is as clearly for the plaintiff; therefore, for all parties, it will be better to drop the costs.

His Lordship therefore ordered the said decree to be affirmed, save as to that part thereof which relates to the settlement of the leasehold estate called *Ford*; and as to the plaintiff's bill, so far as it seeks to impeach the settlement of that leasehold

(1) This last settlement does not appear in *Reg. Lib B.* 1738. fol. 209. where the above case is stated; but very shortly.

(2) *Twyn's* case, 3 *Co.* 80. *b. Taylor* v. *Jones*, *post* 2 vol. 600.

estate,

estate, and to make the same liable to the plaintiff's demands; his Lordship dismissed the same without costs.

Russel v. Hammond.

And as to the costs of the rest of this suit, that the said decree whereby the same are reserved till after the said report, be varied as follows: that to the time of hearing this cause at the Rolls, no costs be paid on either side, but that the consideration of costs of such other parts of this cause from such hearing, be reserved till the Master shall have made his report; the ten pounds deposit to be paid back to the defendant (1).

(1) *Reg. Lib. B.* 1738. *fol.* 209.

(D) *Concerning the Manner of performing Agreements.*

Arthur O'Keeffe Esq; and *Isabella* his Wife, — Plaintiffs,
James Calthorpe Esq; —— —— Defendant.

November 27th, 1739.

Case 7.

Where children under a marriage settlement have obtained a contingent advantage, the court will not vary it to the prejudice of the issue after marriage.

THE plaintiff *Isabella* being possessed of Old and New *South Sea* annuities and Bank stock, and a marriage being intended between the plaintiffs, previous thereto, the plaintiff *Isabella*, for securing the stocks and dividends for her separate use and disposal, notwithstanding her coverture, did by indenture, with the privity of the plaintiff *Arthur*, transfer the stocks to the defendant, his executors and administrators, in trust that he, his executors and administrators should pay, or suffer plaintiff *Isabella* to receive the dividends and profits thereof for her separate use during her life; provided, that if *Isabella* survived *Arthur*, then the defendant, his executors or administrators should transfer the same to the plaintiff *Isabella*, her executors or administrators, or to such person as she should, apart from her husband, by deed or will appoint, and for want of appointment, to the issue of her body, and for want of such issue, then as to one moiety of such of the stock as should be remaining at the death of *Isabella*, in trust for the plaintiff *Arthur*, his executors and administrators; and as to the other moiety in trust for the defendant, and one *John Burrell* the brother of the half blood of *Isabella*, their executors and administrators.

The marriage took effect, and plaintiff *Isabella* by *Arthur*'s consent applied to the defendant to sell part of the annuities, and to pay the money to her, and to assign the trust to some other trustees; declaring to him it was not her intention that the same should be unalterable, but only to preserve the same in her own disposal; but the defendant insisting he could not safely sell the same or assign his trust without the directions of the court of chancery, the plaintiffs therefore by their bill pray that the defendant might assign his trust, and that the stock and annuities might be transferred, subject to such uses as *Isabella* alone should from time to time direct, and for want thereof, subject to the trusts in the settlement.

O'KEEFFE v. CALTHORPE.

Lord Chancellor: Where under a marriage settlement, the children have obtained a contingent advantage, I will not vary it to the prejudice of the issue after the marriage; if I should, I might sit here only to alter marriage agreements upon the particular whim of a feme covert. Therefore let the plaintiff *Isabella* make the appointment, and let the appointee take such interest as the law will give him; for I shall not lend him the assistance of this court to make such appointment more effectual than it will be at law.

The court will not change a mere trustee for a wife under a marriage settlement, without sending it first to the master, to see if the person proposed is a proper person.

A person might as well bring a bill in this court to change trustees to preserve contingent remainders; if the defendant had been merely a trustee for the lady, there might be some grounds for this application; though if I was inclinable to change the trustee, I would not do it unless it went first before the Master to examine, Whether the person proposed is a proper person.

A new trustee being by the consent of all parties added to the old one, his Lordship decreed the defendant to transfer the annuities in question in such manner, as to vest the same in himself and the new trustee, subject to the same trusts as are in the said deed of agreement; and decreed that the plaintiff's bill should be as to other matters dismissed (1).

(1) *Reg. Lib. B.* 1739. *fol.* 46.

C A P. VII.

Administrators.

Vide title *Executors.*

C A P. VIII.

Alien.

Anon.

December the 21st, 1737.

Case 8.

The persons of foreigners, subject to the authority of this court, only while in *England*; but though their persons are out of the reach of this court, yet the property they have here in the funds, is under the controul of it.

A Foreigner in the king of *Prussia*'s service applies to the court, to compel his wife, now residing at *Dantzick*, to deliver up his children; one of 15, and another of 13 years of age, to be educated by him as having a natural right to the care of them. A bill was brought some years ago by the wife, who had then been separated from her husband a considerable time, to have an allowance out of stocks here in *England*, belonging to her, for the maintenance of the children; which was decreed accordingly.

Lord

Lord Chancellor: I have no power over the perſons of foreigners any longer than while they are in *England*, for then they owe a local obedience; but as they are now in foreign countries, my authority will not reach them; but though I cannot come at their perſons, yet I might lay my hand upon any property they have here in ſtocks, &c. but as a ſum of money has been already ordered out of a fund belonging to the petitioner's wife, for the maintenance of her children, I cannot make any alteration in that order, while the children continue under her cuſtody, for it is given merely upon their account, and not the mother's. ANONYMOUS.

Ramkiſſenſeat of the Town of *Calcutta*, at *Fort William* in *Bengal* and others, — — } Plaintiffs,

Hugh Barker an Infant, by his Guardian and others, *et e contra*. } Defendants.

December the 4th, 1739. S. C. *poſt* 51.

Caſe 9.

IT was moved on behalf of the plaintiff in the original cauſe, that he may be at liberty to ſue out duplicates of the commiſſion, to take his anſwer to the plaintiff's bill in the croſs cauſe, and that the commiſſioners may by ſuch commiſſion be impowered to ſwear an interpreter, to interpret the oath to the defendant in the croſs bill, and to tranſlate his anſwer from the *Bengal* *language into *Engliſh*, if it ſhall be found neceſſary, and that theſe words *corporal* and *upon the holy Evangeliſt* may be left out of the commiſſion, and inſtead of the latter words, on a proper oath in the moſt ſolemn manner, or ſome other proper words, and agreeable to the circumſtances of the defendants' caſe, may be inſerted in their room.

The court directed a commiſſion to the Eaſt Indies, to take the anſwer of the defendant to the croſs bill, who was of the Gentoo religion; and impowered two or three of the commiſſioners to adminiſter ſuch oath *in the moſt ſolemn manner*, as in their diſcretions ſhall ſeem meet; and if they adminiſtred any other oath than the Chriſtian, to certify to the court what was done by them; that, if there ſhould be any doubt as to the validity, the opinion of the judges might be taken.

In ſupport of the motion was cited 1 *Vern.* 263. *Anon.* Where a *Jew* was ordered to be ſworn to his anſwer upon the Pentateuch. *Hale's 2d Part of the Pleas of the Crown.* 279. [*20]

Lord Chancellor: It depends upon what is admitted on the other ſide, that the defendant in the croſs cauſe is of the *Gentoo* religion, and an idolater.

I have often wondered, as the dominions of *Great Britain* are ſo extenſive, that there has never been any rule or method in caſes of this ſort.

The general rule is, that all perſons who believe a God, are capable of an oath; and what is univerſally underſtood by an oath is, *that the perſon who takes it, imprecates the vengeance of God upon him, if the oath he takes is falſe.* Definition of an oath.

It was upon this principle that the judges were inclined to admit the *Jews* who believed a God, according to our notion of a God, to ſwear upon the Old Teſtament.

And Lord *Hale* very juſtly obſerves, it is a wiſe rule in the kingdom of *Spain*; that a heathen and idolator ſhould be ſworn upon what he thinks is the moſt ſacred part of his religion.

Ramkissen-seat v. Barker.

If a *Jew* should be indicted for perjury, and it is laid in the indictment that he swore *tactis sacro-sanctis Dei evangeliis*; yet according to *Hale* the word *evangeliis* in the indictment may be answered by the Old Testament, which is the *evangelium* of the *Jews*.

In order to remove the difficulties in this case, I shall direct that these words, *upon the holy evangelists*, may be left out.

The next consideration is, What words must be inserted in their room? Now on the part of the plaintiff in the cross bill, it is desired, that I should appoint a solemn form for the oath: I think this very improper; because I may possibly direct a form that is contrary to the notions of religion entertained by the *Gentoo* people

I will therefore make this rule, That two or three of the commissioners may administer such oath in the most solemn manner, as in their discretions shall seem meet; and if the person upon the usual oath being explained to him shall consent to take it, and the commissioners approve of administring it (for he may perhaps be a Christian convert) the difficulty is removed; or if they should think proper to administer another oath, that then they shall certify to the court, what was done by them, and that will be the proper time to controvert the validity of such an oath, and to take the opinion of the judges upon it, if the court should have any doubt.

The words corporal oath may stand, for lifting up an arm, or other bodily member. This will come up to the meaning of a corporal oath; but upon *the Attorney General's* suggesting that there might be no ceremonies in their form of taking oaths, these words were likewise left out, and the words *most solemnly* to be inserted in their room (1).

Sir Dudley Rider.

[21]

There was likewise a cross motion for *Barker* the defendant in the original and plaintiff in the cross bill, that all further proceedings in the original cause may be stayed until the plaintiff in the original cause, and the defendant in the cross cause, shall have fully answered the cross bill.

The court will not stay proceedings in an original cause, 'till the answer comes in to the cross bill, but will only stay publication.

Lord Chancellor: The general rule in this court is not to stay proceedings in an original cause, till the answer comes in to the cross bill, but to stay publication only (2). Indeed it would have been of course to stay proceedings in the original cause, if the plaintiff in the cross cause had brought his bill, before he had put in an answer to the original bill (3).

In the cause of *Omychund* v. *Barker*, & *Franco* v. *Barker*, there were two more orders of the same day to the same purpose.

(1) The commissioners were empowered, "to swear an interpreter to "interpret the oath, and interrogatories "are to be exhibited to the plaintiff's "witnesses at each of the said commis-"sions, and also to interpret their depo-"sitions to the said interrogatories, and "that these words (*corporal*) and (*upon the holy evangelist*) be left out of such "commissions, and instead of the latter "words, the word (*solemnly*) be insert-"ed." *Reg. Lib. B.* 1739 *fol.* 61.

(2) Ordered, "that publication in "the original cause be enlarged, until "the plaintiffs in that cause shall have "fully answered the said cross bill." *Reg. Lib. B.* 1739. *fol.* 61.

(3) *Post.* 291. *Creswick* v. *Creswick*.

Omychund v. Barker.

Michaelmas term, 1744.
2 Eq. Caf. Abr. 397. pl. 15. S. C. 1 Wilf. Rep. 84. Note 2. Harg. Co. Lit. 6. b.

Case 10.

Lord Chancellor, affifted by Lord Chief Juf. Lee, Lord Chief Juf. Willes, and Lord Chief Baron Parker, of opinion that the depofition of witneffes of the Gentoo religion, fworn according to their ceremonies, ought upon the fpecial circumftances of this cafe to be read as evidence in the caufe.

PUrfuant to the order above of the 4th of *December* 1739, a commiffion went to the *Eaft Indies*, and on the 12th of *February* 1742, the commiffioners certified, that among other witneffes for the plaintiff, they had examined *Ramkiffenfeat*, and *Ramchurnecooberage*, and feveral others, fubjects of the *Great Mogul*, being perfons who profefs the *Gentoo* religion, and that they were folemnly fworn in the following manner, *viz.* "The feveral perfons being before us, with a bramin or prieft "of the *Gentoo* religion, the oath prefcribed to be taken "by the witneffes was interpreted to each witnefs refpec"tively; after which they did feverally with their hands touch "the foot of the bramin or prieft of the *Gentoo* religion, be"ing alfo before us with another bramin or prieft of the fame "religion, the oath prefcribed to be taken by the witneffes was "interpreted to him; after which *Neenderam Surmah*, being "himfelf a prieft, did touch the hand of the bramin, the fame "being the ufual and moft folemn form, in which oaths are "moft ufually adminiftered to witneffes who profefs the *Gentoo* "religion, and the fame manner in which oaths are ufually "adminiftered to fuch witneffes in the courts of juftice, erected "by letters patents of the late king at *Calcutta*."

The caufe came on this term upon the merits, and the bill was brought to have a fatisfaction for 67,955 rupees, amounting to about 7,600 *l. Englifh* money, from the eftate of the late Mr. *Barker*, the father of the defendant.

Mr. *Barker* in *July* 1729 being appointed, by the *Eaft-India* Company, Chief of *Patna*, applied to the plaintiff, who was a confiderable merchant, to be engaged in partnerfhip with him in the fale of goods.

The plaintiff was to advance the money for buying the goods, and in confideration thereof Mr. *Barker* was to allow him intereft upon a moiety at 12 *l. per cent.* [22]

The goods were fold by Mr. *Barker* for a great profit, and the whole money received by him; but he refufed to come to any account with the plaintiff, upon which he filed his bill in 1736, in the mayor's court at *Calcutta*, and when the caufe was ready for hearing there, Mr. *Barker* left *Calcutta*, and took his paffage in a *French Eaft-India* fhip for *Europe*, and upon his withdrawing himfelf, the court at *Calcutta* interpreted it to be a flight from juftice, and decreed that he fhould pay plaintiff's demand in full, and all his cofts.

Mr. *Barker* died in the voyage, but by his will made on the 21ft of *December*, 1736 charges his real and perfonal eftate with the payment of his debts.

The end of the bill was, that all books and papers relating to the dealings between Mr. *Barker* and the plaintiff might be produced, and that the fum before mentioned might be paid with fubfequent intereft, and the cofts in the mayor's court at *Calcutta*.

OMYCHUND v. BARKER. Sir Dudley Rider. Mr. Attorney General for the plaintiff offered to read the deposition of *Ramkissenseat*, but the counsel for the defendant objecting to his being a proper witness, Lord Chancellor ordered the commission and the return to be read, and likewise the letters patent, bearing date the 12th of *Sept.* the 13th of the late king.

Mr. *Tracy Atkyns* argued in support of the objection,

1st, That as the law of *England* now stands, no oath can be administred to make a man a competent witness, but the oath upon the Evangelists.

2dly, That it would be contrary even to the rules of equity to admit any other.

The substance of this argument follows:

I will endeavour to shew, from the oldest authorities extant down to the present time, that the rule has been uniform and invariable as to the particular oath required.

Fleta, lib. 5. *c.* 22. *p.* 344. "*Juramentum est affirmatio vel negatio* "*de aliquo attestatione sacræ rei firmata,*" so that as long ago as *Ed.* the First's time, which is at least 400 years, the general definition of an oath was the person's affirming or denying a thing, with a solemn appeal to the sacred writings for the truth of what he said.

Bracton, fol. 116. the oath that was administered by the justices itinerant, to the jury, summoned to inquire for the crown, agrees exactly with this definition: "*Hoc audite justitiarii, quod* "*ego veritatem dicam de hoc quod a me interrogabitis ex parte domini* "*regis, et fideliter faciam id quod mihi præcipietis ex parte domini* "*regis et pro aliquo non omittam, quin ita faciam pro posse meo; sic* "*me Deus adjuvet, et hæc sancta Dei evangelia.*"

Briton de Challenge de Jurors, c. 53. *p.* 135. describes the oath thus; "*Que jeo verite diray, si Dieu moi aide & les seintz, &* "*pssut les evangelies besses touts hoors sicome notre foy & notre sauva-* "*tion.*"

In Fortescue de Laud. Leg. Angliæ, c. 26. *p.* 58. octavo edition, intituled, How jurors ought to be informed by evidence and witnesses, he says, "*Et tunc adducere potest utraque pars coram*

[23] "*eisdem justitiariis et juratis, omnes et singulos testes, quos pro par-* "*te suâ producere velit, qui super sancta Dei evangelia, per justici-* "*arios onerati, testificabuntur omnia quæ cognoscunt probantia veri-* "*tatem facti, de quo partes contendunt.*"

So that your Lordship sees it is *omnes et singulos testes*, without any exception of persons whatsoever, *qui super sancta Dei evangelia onerati testificabuntur.*

Lord *Coke* in his 2d *Institute* 479, upon the statute of *Westminster* the 2d, says, "*A new oath cannot be imposed upon any subject* "*without authority of parliament, but the giving of every oath must* "*be warranted by act of parliament, or by the common law time out* "*of mind.*" And in the 719th page of the same *Institute* in the "margin," *None can examine witnesses in a new manner, or give an* "*oath in a new case, without an act of parliament.*"

And in his 3d *Institute, c.* 14. *p.* 165. intituled, Of Perjury, Subornation of Perjury, and incidentally of oaths, saith, that the word oath is derived from the *Saxon* word *Eoth*, and that it is expressed by three several names, 1st, *sacramentum a sacrâ & mente* because

because it ought to be performed with a sacred and religious mind, *quia jurare est Deum in testem vocare, et est actus divini cultus*. 2dly, by *juramentum a jure, which signifieth law and right, because both are required and meant, or because it must be done with a just and rightful mind*. 3dly, *jus jurandum a jure et jurando*. Omychund v. Barker.

And in the very next section he saith, *An oath is an affirmation or denial, by any Christian, of any thing lawful and honest, before one or more that have authority to give the same for advancement of truth and right, calling Almighty God to witness, that his testimony is true. So as an oath is so sacred, and so deeply concerneth the consciences of Christian men, as the same cannot be ministred to any, unless the same be allowed by the common law, or by some act of parliament; neither can any oath allowed by the common law, or by act of parliament, be altered but by act of parliament; it is called a corporal oath, because he toucheth with his hand some part of the holy scriptures.*

In the 4th *Institute*, *c.* 64. *p.* 279. he says, An oath ought to be accompanied with the fear of God and service of God, for advancement of truth, *Dominum Deum tuum timebis, et illi soli servies, et per nomen illius jurabis*, taken out of the *Mosaic* law; and the words immediately following are, *Bracton saith, That an alien born cannot be a witness, which is to be understood of an alien infidel.* Deut. chap. vi. v. 13.

I shall beg leave to mention a statute made in the 21st of *Hen.* 8. *c.* 16. touching artificers strangers, in the 4th section of which 'tis enacted, *that the same strangers should, upon lawful warning to them given, by the wardens of divers misteries, within the cities and towns, present themselves to the common hall of the said crafts, and there to receive and take their oath, and be sworn before the wardens upon the holy evangelists, to be true to the king*, &c.

So that notwithstanding aliens and strangers are the subjects of this act of parliament, yet without reservation of any form of ceremony in their own religion, relating to oaths, they are directed to take the oath upon the holy Evangelists: so that the legislature governed themselves by the law as it then stood, and saw no reason to alter it for the private convenience of particular persons. [24]

I appeal to your Lordship's judgment, whether the people who are offered as witnesses, are capable of taking an oath, as the law of *England* conceives of it. The most authentic histories of this part of the world represent the natives as extremely ignorant, and particularly with regard to their notions of religion, absurd and ridiculous, and in their ideas of the Deity so gross, that it would be shocking even to mention. How then can they be said to perform such a ceremony with a sacred and religious mind, which the word *sacramentum* implies?

It appears by the certificates of the commissioners, and even by their own witnesses, who may be supposed to represent it in the most favourable light, that the ceremony is for the person who swears to fall down, and touch the foot of the priest with his right hand.

Can this be said *Deum in testem vocare?* Or is it *actus divini cultus?* so far from being accompanied with the fear [or worship of God, as an oath by our law ought to be] it is meanly prostrating themselves at the foot of a priest, and calling upon the

OMYCHUND v. BARKER. the creature instead of the Creator, and cannot possibly raise any other emotions, but those of contempt and ridicule.

It is said too, that if such person shall swear any thing contrary to truth, *that he will be esteemed a vagabond.*

I do not know how far the people of *India* may be deterred by such an apprehension; but I am confident great numbers of persons here, would be so far from thinking this a punishment, that, if the only effect of forswearing themselves was being a vagabond, they would be more inclinable to break an oath, than to keep it.

I do not find that the priest tells us what are the general notions of the people, as to the belief of a God, but only *that he himself believes in a Supreme Being*; of whom his superior abilities and education may have given him some confused knowledge; and yet the bulk of the people who have not had these advantages may think quite otherwise.

I shall now beg leave to mention the later opinions.

Mr. Serjeant *Hawkins* in his Pleas of the Crown, the last folio edition, 434, under the head of Evidence; says, it seems agreed *to be a good exception, that a witness is an infidel.* "That is, says "he, as I take it, that he believes neither the Old or New Testament to be the word of God, *on one of which* the laws require the oath should be administered."

I expect we shall be told by the Gentlemen of the other side, of Sir *Matthew Hale*'s opinion in his Pleas of the Crown, 2 vol. 279; and therefore I will read the passage, and submit to your Lordship; it is rather in favour of what we contend for, than against us.

"*It is laid down by Ld.* Coke, (*says Ld.* Hale), *that an infidel is* "*not to be admitted as a witness; the consequence whereof would be that* "*a Jew who only owns the Old Testament, could not be a witness.*

[25] "*But I take it that although the regular oath, as it is allowed by* "*the laws of* England, *is* tactis sacro-sanctis Dei evangeliis; "*which supposeth a man to be a Christian: yet in cases of necessity, as in foreign contracts between merchant and merchant, which* "*are many times transacted by Jewish brokers; the testimony of a* "*Jew* tacto libro legis Mosaicæ, *is not to be rejected, and is* "*used as I have been informed among all nations.*

"*Yea the oaths of idolatrous infidels have been admitted in the municipal laws of many kingdoms; especially,* si juraverit per Deum "verum Creatorem; *and special laws are instituted in* Spain, "*touching the form of the oaths of infidels.*

"*And it were a very hard case, if a murder committed here in* "England, *in presence only of a Turk or a Jew, that owns not the* "*Christian religion, should be dispunishable; because such an oath* "*should not be taken which the witness holds binding, and cannot* "*swear otherwise, and possibly might think himself under no obligation, if sworn according to the usual stile of the courts of* England.

"*But then it is agreed, that the credit of such a testimony must be* "*left to a jury.*"

With deference to so great a man, I do not see the consequence drawn from Lord *Coke*'s position, *that an infidel cannot be a witness,*

a witness, therefore a Jew cannot be one; for they believe a God, just in the same manner the Christians do; and the Old Testament is as much the *evangelium* to them, as the New is to us; and therefore widely different from the infidel, who has no notion of the true God. OMYCHUND v. BARKER.

And this was the very reason for admitting the evidence of *Jews* in the case of *Robeley* v. *Langston*, 2 Roll. 314. "*Nota*; "*Wild*, serjeant, on evidence to a jury at *Guildhall*, yesterday, "(where because the witnesses produced were Jews, *Keeling* "Chief Justice swore them upon the Old Testament) desired the "opinion of the court, if this were any oath by the statute of "5 *Eliz.* that might be assigned for perjury; and *per curiam*, it "is so, and within the general words of *juro-sancta evangelia*; "so of the common prayer book that hath the epistles and "gospels; *contra* by *Windham* of a psalm-book only."

It was upon this I apprehend the court formed their opinion, and not upon a consideration of their being brokers in foreign contracts between merchant and merchant.

I submit it upon the whole passage: Sir *Matthew Hale* does not positively say, that, by the laws of *England*, a person who owns not the Christian religion, may be examined according to the form of his own religion, but is only commending the municipal laws of other kingdoms, and throws it out rather as a wish, that the rule were to prevail here, in cases of necessity, than as his opinion; therefore the utmost which can be collected from what he says is, that he thought it a defect in our law.

But though his genius and knowledge were equal perhaps to any one man of the profession; yet I hope I may be allowed to put in the other scale, the wisdom and experience of the great and eminent persons, who for so many ages before his time [26] have adhered to the form of an oath as the constant and invariable rule.

Besides the present cannot be called a case of necessity, because there are persons in *India*, privy to all these transactions, who are under no objection, as to their capacity of taking an oath; but the plaintiff knew very well, that natives of the same country, engaged in the same interest, and the same business with themselves, were much more inclinable to swear for them.

I will mention but one thing more upon the first head, to shew your Lordship, that nothing but the legislature can dispense with the common and usual form of oaths; and that is the case of the Quakers, who had entertained a notion that all manner of oaths were unlawful; and there is scarce any error perhaps that hath a more plausible colour from scripture than this, which made the case of those who were seduced by it, the more pityable; and yet, upon their refusing to take the oath in a court of justice, to use the words of the preamble to the statute of the 7 & 8 *Will. c.* 34. *s.* 1. for the relief of Quakers, *They were frequently imprisoned, and their estates sequestered, by process of contempt issuing out of such courts, to the ruin of themselves and families.*

If

OMYCHUND v. BARKER. If the law of *England*, with regard to the form of an oath, was so strict, that the judges did not think themselves justified in admitting the most solemn affirmations and declarations of the Quakers instead of the oath, though in favour of persons who agreed in the substantial and fundamental part of the Christian religion with the church of *England*, and who are in all respects very useful and serviceable members of the commonwealth; I hope your Lordship will see no reason to do it in this case, where the persons are proved by the plaintiff himself to be infidels and idolators; and whatever ceremony they may have in swearing, it cannot be called a solemn and religious one.

In the second place, I shall endeavour to shew, that it would be contrary to the rules of equity to admit this evidence.

And here I must submit to the court, that in the admitting this evidence, very great hardships and inconveniences must necessarily arise to the defendant, and that he is brought into this court upon very unequal terms.

Should your Lordship admit the depositions of these witnesses to be read, the plaintiff would have one manifest advantage over the defendant; that notwithstanding his witnesses should assert the grossest falshoods, and be guilty of the most notorious perjury, yet the defendants would be without remedy; for there is no indictment that could be framed against them, which could be supported; for I apprehend it to be a material ingredient in all indictments of this kind, that *per se sacro evangelio voluntariè et corruptè commisit perjurium*; and that omitting these words would be a fatal error, and quash the indictment.

If this expression be necessary in the indictment, these witnesses, let them be ever so guilty, must go unpunished; for I
[27] am afraid it will not be sufficient, to maintain the indictment, to say, that *touching the foot of the priest* with his right hand, *voluntariè et corruptè commisit perjurium*.

Upon the commission, your Lordship was pleased to say, that you wondered as the dominions of *Great Britain* are so large, and their commerce so extensive, and as things of this kind must have happened before, there should be no method, as yet established on such occasions.

Whatever prudential reasons there may be to introduce any new rules in future cases, we hope that as courts of equity govern themselves by the same rule, with regard to admission of evidence, as the courts of law; that your Lordship will be of opinion, that you cannot, without overturning the law intirely, allow these depositions to be read; and that nothing but an act of parliament can alter the present form of swearing.

Sir Dudley Rider. Mr. Attorney General for the plaintiff, by way of answer to the objection, stated a few particular facts.

1st, That the matters now in question, are matters of commerce arising in a foreign country, in a foreign jurisdiction, between a Christian and an infidel.

2dly, That in this country the *Gentoo* religion prevailed, and that *Calcutta* was only a factory within this country.

3dly, That

3*dly*, That the witnesses do believe in a Deity. Omychund v. Barker.

4*thly*, Not only that they believe in a Deity, but that in swearing they use an expression equivalent to ours. *So help me God.*

5*thly*, That solemn oaths to attest facts, is usual amongst them.

6*thly*, That they understand an oath in the same manner we do.

7*thly*, That by the letters patent establishing a court at *Calcutta*, there is all the reason in the world to admit their evidence.

8*thly*, In point of fact, *Gentoos* are admitted as witnesses in the court of *Calcutta*.

9*thly*, That the manner made use of in the present cause, is the most solemn and customary.

10*thly*, That these witnesses are all of the *Gentoo* religion.

He then submitted it, Whether a person of such a religion, and an infidel, may be admitted as a witness. He then made two propositions.

1*st*, That the witness is capable of taking an oath as an infidel, according to the opinion we have of oaths.

2*dly*, That there is nothing in our law that prevents him from being a witness.

An Infidel properly defined is a Deist, that does not believe the Christian religion.

All that in point of nature and reason is necessary to qualify a person for swearing, is the belief of a God, and an imprecation of the Divine Being upon him if he swears falsely.

This is the sense of all the civilized nations in the world, the foundation of all treaties; *nullum enim vinculum ad astringendam fidem jure jurando majores arctius esse voluerunt.* Lib. tert. M. T. C. de Offic. sec. 31. [28]

The best writers on Christian morality have gone so far as to admit the oath to false gods. It is the sense of *Grotius*; *sed et si quis per falsos deos juraverit, obligabitur; quia quamquam sub falsis notis, generali tamen complexione, numen intuetur: ideoque Deus verus, si pejeretur, in suam injuriam id factum interpretatur.* Lib. 2. c. 13. s. 12.

Nothing is proper to the oath here, but *so help me God*; when it comes to the corporal part, I own it is *supra sanctum evangelium*, which is a mere ceremony and not essential.

I can go to a higher authority, the authority of the *Jewish* religion, and of the old patriarchs; and it will appear they constantly considered the heathens capable of an oath. The instance of *Isaac* and *Abimelech* swearing to one another, *Genesis* 26. *v.* 31. and in the 31st of *Genesis*, *v.* 53. *Jacob* swears by the fear of his father *Isaac*, and accepted of *Laban's* oath without hesitation, though he swore by false gods.

Consider now the circumstances and situation of the *Gentoos* with respect to the oath they have taken.

1*st*, As to the form of the oath.

And then as to the corporal parts,

OMYCHUND v. BARKER.

As to the form of the words: it is the same we make use of here; for the interrogatory, *Do you believe in the Supreme Being*, &c. is read over and interpreted to him, and he takes it in the same sense other people do; which will put an end to the whole objection.

As to the corporal part: where is the objection to it, at least it shews great humility, and is in all respects applicable to the kissing of the book, and equally significant, for both are no more than signs, and not material to the oath.

The Gentlemen, by their manner of arguing would make one believe, there is only one form of an oath.

Grotius in the same chapter and book as before mentioned, and 10th sect. says, *Forma jurisjurandi verbis differt, re convenit; hunc enim sensum habere debet, ut Deus invocetur, puta hoc modo, Deus testis sit, aut Deus sit vindex, quæ duo in idem recidunt.* *Vid. Voet*, upon the *Dig. lib.* 12. *tit.* 2. *sec.* 2.

A greater authority, *our Saviour*, says, in St. *Matthew's* gospel, *Who swears by the temple, swears by the God who inhabits it.*

So that all terminates in a solemn appeal to the Deity, for the truth of what he says.

There are several passages in *Livy*, *Polybius*, and *Grotius*, which shew that oaths are totally arbitrary.

The consequence must be, that an infidel is capable of an oath.

2*dly*, Whether there is any thing in the law of *England* that impugns it?

It is laid down by Lord *Coke*, that an infidel cannot be a witness, and said that his position is proved by all the cases cited out of the old authorities.

[29] It may indeed be laid down as a general rule, but therefore does it follow, that there shall be no exception? Does not our law say, *exceptio probat regulam*?

It is extremely proper there should be some general rules in relation to evidence; but if exceptions were not allowed to them, it would be better to demolish all the general rules.

There is no general rule without exception that we know of but this, that the best evidence shall be admitted, which the nature of the case will afford.

I will shew that rules as general as this are broke in upon for the sake of allowing evidence.

There is no rule that seems more binding than that a man shall not be admitted an evidence in his own case, and yet the statute of Hue and Cry is an exception.

A man's books are allowed to be evidence, or, which is in substance the same, his servant's books, because the nature of the case requires it, as in the case of a brewer's servants (1).

Another general rule, that a wife cannot be a witness against her husband, has been broke in upon in cases of treason.

(1) See *Glynn* v. *Bank of England*, 2 *Ves.* 43. *Lefebure* v. *Worden*, *ibid.* 54. *Peacock* v. *Monk*, *ibid.* 193.

Another

Another exception to the general rule, that a man may be examined without oath: the last words of a dying man are given in evidence in the case of murder; a child may be examined without oath; *Lord Chief Justice Hale's Pleas of the Crown*, 1 *vol. p.* 634; but, if capable of considering the obligation of an oath, may be sworn. OMYCHUND v. BARKER.

This sufficiently shews how much our law allows exceptions against oaths.

Lord Chief Justice *Lee* interrupted the Attorney General, and said, it was determined at the *Old Bailey* upon mature consideration, that a child should not be admitted as an evidence without oath.

Lord Chief Baron *Parker* likewise said, it was so ruled at *Kingston* assizes before Lord *Raymond*, where upon an indictment for a rape he refused the evidence of a child without oath.

Mr. Attorney General then proceeded in his argument, and insisted that admitting a *Jew* to be sworn is an exception from the general rule: what is the definition of an infidel? Why, one who does not believe in the Christian religion. Then a *Jew* is an infidel, for the sense of *evangelium* has been perverted, and ought to be confined to the New Testament only; for it is used by our Saviour as good tidings, in opposition to the bondage the *Jews* then underwent, and was delivered to them first.

We are taught there are but four Evangelists, and the prophets are not so, and yet the Gentlemen of the other side would introduce many more. As to the passages in *Deuteronomy*, it happens unfortunately that the books of *Moses* are no part of our religion; nor does the law esteem them such.

Are all the *Jewish* dispensations confirmed by our law? No. This was as much a municipal law to the *Jews*, as the municipal laws here to *England*, or the laws of *Solon* to *Athens*, or of *Lycurgus* to *Lacedæmon*, and therefore quite foreign, and nothing to do with the present question. [30]

He mentioned then what had happened before a committee of privy council the 9th of *December* 1738, on a complaint against General *Sabine*. A *Turk* was brought there and offered as a witness, and to be sworn upon the alcoran, and was sworn accordingly.

So far this agrees exactly with the present case; but it may be said, this was not in a court of justice, but rather a matter of state. In that respect there is some difference, but it will not take away the usefulness of the precedent, to shew that a court or persons may alter the form of an oath.

This *Indian* witness has sworn by the very same words that we do, therefore your Lordship will not presume that he means any other God than we do.

It is of the greatest moment, that we should have commerce and correspondence with all mankind; trade requires it, policy requires it, and in dealings of this kind it is of infinite consequence, there should not be a failure of justice. It has been objected that we might have other evidence.

But

OMYCHUND v. BARKER. But though we may have flighter evidence, why should we be tied down to this, and debarred of the present, which is much stronger? Gentoos are the common brokers in this country, and the necessity of the case will work strongly for us.

There was a time when even *Jews* were not sworn, and no longer since than the 5th of *November* 1732, there was a commission out of the Exchequer in the cause of *Lopes* and *Nunes*, in which there was a distinction between the oath for *Jews* and Christians; for if *Jews*, they were directed to be sworn *supra Vetus Testamentum* only.

An *objection* was likewise made, that this *Indian* would not be liable to be punished for perjury; to which it is answered, That if the court should be of opinion this is an oath which may be taken, of consequence he is liable to be punished, if forsworn.

Another *objection* is that Quakers could not be admitted as witnesses till an express act of parliament to empower them. The *plain answer* is, that they would not take the oath at all, therefore their solemn affirmation was not sufficient, because it had not the essence of an oath.

Upon the whole, as it is a case of necessity, and we have fully in proof from the return of the commissioners, that they believe in the Supreme Being, these witnesses ought to be admitted.

November the 10th 1744.

* Mr. *Murray*. * Mr. Solicitor General, of the same side with the Attorney General.

It is expressly certified by the commissioners, that the oath prescribed to be taken by our law was read over to the plaintiff's witnesses.

The *objection* is, That they have not made the use of the corporal ceremony, the kissing of the Evangelists.

[31] But they have made use of another symbol, the taking the priest's foot with their right hand, because this is the form and ceremony most binding in their own religion, and notwithstanding this, an objection has been taken to the reading of their evidence.

First, Because they have not touched the Evangelists and are Pagans, and therefore cannot be admitted.

Secondly, Supposing they may be admitted as witnesses, yet under the sanction of the oath thus certified, they ought not to be admitted as witnesses.

In most of the reasons the Gentlemen have begged the question, and have insisted that the admitting their evidence is contrary to law, and they cannot be indicted for perjury.

But if the admission is not contrary to law, then of course the witnesses are liable to be indicted for perjury as well as a *Jew*, who may be indicted *tacto libro legis Mosaicæ*.

The statute of the 5th of *Elizabeth* leaves this matter intirely open.

'Tis ſaid there is no one precedent or caſe of a heathen ſworn according to the ceremonies of his own religion, ever exiſted before in *England* in courts of juſtice, proceeding according to the common law. OMYCHUND v. BARKER.

Pagans have been ſworn in the court of admiralty, as Dr. *Strahan* and Dr. *Andrews* have informed me; but they had no note of the caſe, and had forgot the name of it.

No wonder that it has not exiſted before, becauſe all our commerce is carried on by our going to them, inſtead of their coming here.

The caſe of a *Jew* as a witneſs in a private cauſe never exiſted 'till after the reſtoration; they went out of *England* the 18th of *Edward* the 1ſt, and did not return 'till *Oliver Cromwell*'s time.

The only authority of conſequence cited, is a ſaying of Lord *Coke's*, *Co. Lit.* 6. *b.* *That an infidel cannot be a witneſs.*

This ſaying is not warranted by any authority, nor ſupported by any reaſon, and lately contradicted by common experience. Lord *Coke* meant *Jews*, as emphatically *Infidels* by ſhutting their eyes againſt the light. He hardly ever mentions them without the appellation of *Infidel* Jews, 2 *Inſt.* 506, 507; *and thus the noble king (meaning* Edward *the Firſt) baniſhed for ever theſe infidel uſurious Jews:* therefore Lord Chief Juſtice *Hale* was not miſtaken when he underſtood Lord Chief Juſtice *Coke* meant *Jews* for Infidels as well as others.

That all the law books when they mention an oath mean a Chriſtian oath, is no argument at all; *Fleta*'s definition, *magis licitum jurare per Creatorem quam creaturam:* this ſhews the oath was not fixed, but like the oath ſworn in the *Roman* empire after the eſtabliſhment of Chriſtianity; and Lord *Coke*'s ſaying an oath is an affirmation or denial by a Chriſtian, is no wonder at all, for the laws of *England* could ſpeak only of the Chriſtian oath, becauſe they had no intercourſe with Pagans.

The arguments of the other ſide therefore prove nothing; for does it follow from hence that no witneſſes can be examined in a caſe that never ſpecifically exiſted before, or that an action cannot be brought in a caſe that never happened before?

Reaſon, ſtated to be the firſt ground of all laws, by the author of the book called *Doctor and Student*, and general principles muſt determine the caſe; therefore the only queſtion is, whether upon principles of reaſon, juſtice and convenience, this witneſs ought to be admitted. Upon this occaſion I ſhall lay down two propoſitions. [32]

Firſt, That by the practice of *England*, and of all the nations in the world that are Chriſtians, perſons, though not of the Chriſtian perſuaſion, may be admitted as witneſſes, and ſworn according to their own form.

Secondly, That the caſe of a Pagan is within this reaſoning, and authority.

Caſes of law depend upon occaſions which give riſe to them.

Where the commerce and intercourſe is moſt frequently with the Pagans, the inſtances to be ſure will moſt frequently ariſe.

 After

OMYCHUND v. BARKER.

After the *Roman* emperors were converts, Chriſtians, as well as thoſe who continued Pagans, ſwore according to their fancy, without any particular form. *Seldon, tom.* 2. *f.* 1467. "*Mittimus* "*hic, principibus Chriſtianis, ut ex hiſtoriis ſatis obvius liquet, ſolennia* "*fuiſſe et peculiaria juramenta, ut per vultum ſancti Lucæ, per pe-* "*dem Chriſti, per ſanctum hunc vel illum, ejuſmodi alia nimis crebra:* "*Inolevit vero tandem, ut quemadmodum Pagani ſacris ac myſteriis* "*aliquo ſuis aut tactis aut præſentibus jurari ſolebant, ita ſoleniora* "*Chriſtianorum juramenta fierent, aut tactis ſacroſanctis evangeliis,* "*aut inſpectis, aut in eorum præſentia manu ad pectus amota, ſub-* "*lata aut protenſa; atque is corporaliter ſeu perſonaliter juramen-* "*tum præſtari dictum eſt, ut ab juramentis per epiſtolam, aut in* "*ſcriptis ſolummodo præſtitis diſtingueretur, inde in vulgi paſſim* "*ore.*" Upon my corporal oath.

So that by this paſſage out of *Selden* it appears, the corporal part which prevails now all over Chriſtendom, was taken from the Pagans, and by degrees under the *Greek Roman* emperors, it came to be eſtabliſhed, that this ceremony ſhould be uſed.

The opinion of the *Greek Roman* emperors, as to the oaths of perſons of other perſuaſions, is mentioned by *Selden, tom.* 2. *p.* 1468. to be as follows: "*Alienæ autem perſuaſionis homines per* "*id quod venerantur illi, et juxta modum quo venerantur, adjurari* "*conſueverunt.*" And in *p.* 1469. *Selden* gives a long account of a particular ceremony in ſwearing *a Jew* in courts of juſtice; and before the 18th of *Edward* the Firſt, the perſon adminiſtring an oath to a *Jew*, ſaid, If you don't ſpeak the truth, *veniant ſuper caput tuum omnia peccata tua, & parentum tuorum, et omnes maledictiones quæ in lege Moſaicâ et prophetarum inſcriptæ ſunt ſemper tecum maneant.*" To which he anſwered, *Amen.*

In *Spain* the *Turks* poſſeſſed the greateſt part of the kingdom till the time of *Ferdinand* the Catholic; what did they then do, when Chriſtians and *Turks* had controverſy together? Why, according to *Selden tom.* 2. 1470. the form of the oath was in *Spaniſh* to ſwear as he hoped to be ſaved by the contents of the alcoran, and ſays he, "*Pœna autem Mauro perjuro inflicta eſt, non minuſquam Chriſtiano, licet pro locorum et ſeculorum diſcrimine diſpar.*"

[33] Thus it ſtands upon the authorities of Chriſtian countries, where ſuch queſtions have ariſen; but, as I ſaid before, the queſtion did not ariſe here till after the reſtoration. Was it then determined that a perſon not a Chriſtian ſhould not be ſworn? No! the firſt time it exiſted, the court determined that he ſhould be ſworn according to his own principles.

No caſe of a *Turk* ſworn upon the alcoran in *England* but that before the council, who were of opinion, greatly aſſiſted and greatly attended, that he might be ſworn upon the alcoran.

Here is a material circumſtance in this caſe, a court erected in *Calcutta*, by the authority of the crown of *England*, where *Indians* are ſworn according to the moſt ſolemn part of their own religion.

All occaſions do not ariſe at once; now a particular ſpecies of *Indians* appears; hereafter another ſpecies of *Indians* may ariſe; a ſtatute very ſeldom can take in all caſes, therefore the com-

mon law, *that works itself pure* by rules drawn from the fountain of justice, is for this reason superior to an act of parliament. Omychund v. Barker.

The oldest books of all countries mention the solemnity of an oath, as a security for a person's speaking the truth; they can do no more than lay him under the most sacred and binding obligations; they all call it appealing to God for the truth, and deprecating his vengeance as they speak truth.

There is not a book upon the general law of nature and nations, but admits that Christians may allow persons to swear *per Dominum et per falsos deos*. It is so laid down in the Decretals, in *Grotius*, and *Puffendorf*, who in his 4th book, 4th sect. and 122d page, saith, "That part of the form in oaths under "which God is invoked as a witness, or as an avenger, is to be "accommodated to the religious persuasion which the swearer "entertains of God; it being vain and insignificant to compel "a man to swear by a God whom he doth not believe, and "therefore doth not reverence; and no one thinks himself "bound to the Divine Majesty in any other words, or under "any other titles, than what are agreeable to the doctrines of "his own religion, which in his judgment is the only true way "of worship: and hence likewise it is, that he who swears by "false gods, yet such as were by him accounted true, stands "obliged, and if he deceives, is really guilty of perjury, be-"cause, whatever his peculiar notions are, he certainly had "some sense of the Deity before his eyes, and therefore, by wil-"fully forswearing himself, he violated, as far as he was able, "that awe and reverence he owed to Almighty God; yet when "a person, requiring an oath from another, accepts it under a "form agreeable to that worship which the swearer holds true, "and he himself holds for false, he cannot in the least be said "hereby to approve of that worship."

The oath must be always understood according to the belief of the person who takes it; not only Christian writers now, but before Christianity, the world was divided into a vast variety of opinions, and yet every man was admitted to speak according to his own belief, "*Dig. lib.* 12. *t.* 2. *f.* 5. *Omni enim omnino* "*licitum jusjurandum, per quod quis sibi jurari, idoneum est, et si ex* "*eo fuerit juratum, prætor id tuebitur: divus pius jurejurando,* "*quod propriâ superstitione juratum est, standum rescripsit. dato ju-*"*rejurando, non aliud quæritur, quam an juratum sit: remissa* "*quæstione, an debeatur, quasi satis probatum sit jurejurando.* Lord Stairs's Institute 694. [34]

I do not find any authority has been produced from any other country, that such oath ought not to be admitted: the reason why Ld. Ch. Jus. *Eyre* would not suffer the *Indian* a worshipper of the sun to be sworn upon the Evangelists was, because he did not believe in Christianity; but if he cannot be sworn at all, manifest injustice, and manifest inconvenience must follow.

Heathens bought the goods, heathens sent them, heathens knew the price, heathens kept the account. Would it do honour then to the Christian religion, to say, that you cannot swear according to our oath, and therefore you shall not be sworn at all?

What

OMYCHUND v. BARKER. What muſt the heathen courts think of our proceedings? Will it not deſtroy all faith and confidence between the contracting parties? Is the caſe of the *Turk* or *Jew* ſwearing according to their religion, different from the *Indians* ſwearing according to his? The objection is ſtronger againſt the *Turk* becauſe he ſwears upon the alcoran, which we think an impoſture; but the *Indians* here ſwear by one ſupreme God, without appealing to any particular book or authority in their religion.

It is ſaid a heathen is not to be believed.

Is it not known that all the heathens believe in a God? I will refer them to *Tully* in his Tuſculan Diſputations, *lib.* 1. *ſ.* 13. "*Porro firmiſſimum hoc afferri videtur, cur Deos eſſe credamus, quod nulla gens tam fera, nemo omnium tam ſit immanis, cujus mentem non imbuerit Deorum opinio.* No country can ſubſiſt a twelvemonth where an oath is not thought binding, for the want of it muſt neceſſarily diſſolve ſociety.

2dly, It is objected, that ſuppoſing they may be admitted as witneſſes, yet under the ſanction of the oath thus certified, they ought not to be admitted, for that the form is ridiculous, and their notions of religion not certified by the commiſſioners.

But the oath they have taken ſhews it; for the commiſſioners have certified that they have ſworn by one God, and alſo proves that they think themſelves under the tye of an oath.

Look into books of travels, and you will find that heathens, eſpecially *Gentoos*, believe in one God the Creator of the world, though they may have ſubordinate deities, as the papiſts who worſhip ſaints. *Relig. Cerem. vol.* 3. 380, 381, 398.

No doubt but they all have a notion of a God, according to *Tully*: but to uſe a greater authority than *Tully*: "They are a "law unto themſelves, which ſhew the work of the law written "in their hearts, their conſciences alſo bearing witneſs, and their "thoughts the mean while accuſing or elſe excuſing one another." St. *Paul's epiſtle to the Romans*, 2 *ch.* 14th & 15th *verſes*.

The corporal ceremony is a mere matter of form, and not of the eſſence of an oath: *Du Freſne*'s Gloſſary ſays, that monks [35] ſwore by kiſſing the feet of the abbot, nay the abbots ſwore by their word only, from whence the expreſſion *in verbum ſacerdotis*; and I cite this to ſhew, that as it has varied ſo much, it is all form.

Lord Ch. Juſt. *Lee* deſired he would anſwer the objection as to the form of indictments of perjury upon the holy Evangeliſts which are neceſſary words.

Mr. Solicitor General. There is no inſtance of a *Jew*'s being indicted for perjury.

Lord Ch. Juſt. *Lee*. I have tried a *Jew* myſelf upon an indictment of perjury.

Mr. Solicitor General inſiſted, That the indictment would not be wrong againſt a *Jew* if it was *tacto libro legis Moſaicæ*. No precedents but what are of indictments againſt Chriſtians for perjury before the reſtoration; and ſince that time it is incumbent on the other ſide to ſhew, that it has been held to be ill,

ill, when the indictment against a *Jew* says, that he was sworn on the Pentateuch. OMYCHUND v. BARKER.

Mr. *Clarke* of the same side.

That religion *ex vi termini* means the belief of the existence of the Deity.

To shew further the necessity of admitting this evidence even with regard to intercourses between Christian countries themselves, *vid. Voet's Commentary on the Pandect.* 602. *Sine evangelis tactu, &c.* If this oath cannot be administred, because not upon the Evangelists, the same objection will hold as to a *Dutchman*, who does not swear as we do on the New Testament.

As to the opinions of the commentators on the civil law, *vide Jacumb.* 4 *sec. c.* 4. *t.* 2. *Mynsingerus.* 6 *Cent. Obs.* 20. *p.* 321.

There was a time when swearing on the holy Evangelists was not the practice here; for when St. *Austin* introduced the Christian religion, the inhabitants were tenacious of their own customs, and therefore he indulged them.

There were not above twelve *Jews* in the kingdom before the restoration. And they deputed one of the principal persons amongst them, in *Oliver Cromwell's* time, to come over hither, in order to find out, Whether *Oliver* was the Messiah or not?

In *Maddox's* History of the Exchequer, in his chapter relating to the *Jews*, p. 166, 167, & 174; there are the following passages: "*Benedictus frater Aaron's Judæi Lincolnia debet xx marcas, pro habenda juratione secundum consuetudinem Judæorum, ad inveniendum si Cryslin Judæus Lincolniæ sit fidejussor ejus, tali scilicet juratione quali [illegible] solebant.*" Mag. Rot. 5. Joh. Rot. 9. a. Linc.

"*Judæi Angliæ debent centum libras, ut Judæi retentores, latrones, et eorum receptatores, per inquisitionem factam per sacramentum legalium Christianorum vel Judæorum, [illegible] de prædicta malicia convicti, a regno [illegible]; sicut continetur in originali.*" Mag. Rot. 22 H. 3. Londonia & Midd.

Si Judæus ab aliquo appellatus fuerit sine teste, de illo appellatu erit quietus solo juramento suo super librum suum; et de appellatu illarum rerum quæ ad coronam nostram pertinent, similiter quietus erit solo sacramento suo super rotulum suum. Rot. Cart. 2 Joh. N. 49. Titulo Carta Judæorum Angliæ. [36]

Ld. *Coke* in the 7th Rep. *Calvin's* case 17, saith, "All infidels are in law *perpetui inimici*; for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility, *&c.*" But he meant perpetual enemies in a spiritual sense, and quotes a passage in scripture to that purpose. *What concord hath Christ with Belial? Or what part hath he that believeth with an infidel?* 2 Cor. vi. 15.

As to the objection that Ld. *Coke* says, no oath can be altered but by act of parliament, it relates to some particular officers of the crown. And as to the civil consequences of punishment for perjury, Ld. *Coke*, in his third Inst. 164, on perjury, says, that with respect to a person being charged with a breach of oath, the question is, Whether it was lawfully administred?

Then

Omychund v. Barker.

Then if the oath administred here is agreeable to the genius of the laws of *England*, will they not be liable to punishment for a breach of it; for I would submit it, Whether the crime may not be stated specially, and recite the ceremony of the witness's taking the oath, provided it cannot be laid in the usual common form?

Mr. *Clute's* reply, who was the leading counsel for the defendant *Barker*.—*Nov.* 12, 1744.

As to the reasons urged from necessity, and inforced from what the law does in similiar cases, it is not put in issue, nor proved that there is a necessity for having these witnesses. It is not said by the counsel for the plaintiff, that there is no other way of carrying on business in the *East Indies*, without those persons, nor is it even pretended in the bill itself; if there is no such necessity, the argument from thence can have no weight in this case; and I hope this is an answer to what has been called necessity and a failure of justice, if these witnesses should not be admitted.

The act of 2 *Geo.* 2. *c.* 21. in the case of murder, where the stroke was at sea, and death at land, or *vice versâ*, is to take effect only *in futuro*; so that if a murder of this sort had been committed by a person before, here was certainly a failure of justice; and yet the legislature would not by a law, *ex post facto*, include such person in this act.

I say this with regard only to the particularity of the persons concerned as witnesses. As to the principal question, it is endeavoured to be supported by the other side, by principles of reason, by authority of scripture, and by rules of the civil law.

The cases from scripture are not similiar, and arguments *a pari*.

To say it is natural to have a religion, and to believe a God, I think so in some measure; but yet it is otherwise in experience, *Psalm* 115. *ver.* 4th and 8th. "*Their idols are silver and* [37] "*gold, even the work of men's hands; they that make them are like* "*unto them, and so are all such as put their trust in them.*"

As to the oath of *Abraham* and *Abimelech*, there was not then any set form existing, nor was it an oath to be taken in a court of judicature. *Laban's oath to Jacob* was of the same kind, and *Jacob* accepted it, as thinking it better than no oath at all.

This therefore is far from convincing that every religion does rest in the belief of a God and all his attributes, for it would be proving too much, *viz.* that there never was a false religion in the world.

Next as to the sort of religion now before the court, nothing is more certain than that the witnesses are *Gentoos*, and though the commissioners need not have certified all the tenor of their religion, yet they should have certified it, so far as their religion was concerned in taking an oath; and as to their notions of a Deity's being a rewarder of good, and an avenger of evil, *vid. Maffæus's Hist. Judæor', lib.* 1. *fol.* 36.

As to the authorities from the civil law, *Grotius*, *Puffendorf*, *&c.* they are not authorities to conclude upon the common law, for

for the civil law is not received as the rule of property here, much less as to the rule with regard to our criminal law. The civilians hold different rules of property from us, and differ in nothing more than in admitting evidence, for they reject *histriones*, *&c.* and whole tribes of people. Much the greatest part of the civil law is only opinions and sayings of great men, but the sayings of the judges in our law are of much greater weight, because they are sayings when the cause was judicially before them.

The Lord Chief Justice *Hale* says, Oaths of Heathens have been admitted in the municipal laws of other kingdoms. How far soever this great man may differ from Lord *Coke*, he rather speaks of special laws for allowing heathens to swear according to their own form; but these special laws have not yet been made here, and the passage of Lord *Hale* is no more than a wish, and not an opinion.

It is material that nothing is certified in this case as to the witnesses' opinion of our oath, or that the witnesses did repeat the oath, or used any words at all; but it seems that they immediately had recourse to their own ceremony. It is said here were the words *so help me God*, but these witnesses do not appear to have said any thing, and yet care is taken that the Quakers should repeat.

Where would have been the harm if they had signified their assent to our oath? It would certainly have been more satisfactory. It does not appear that the *Gentoos* believe a God of the universe, and Lord *Hale* thinks it necessary they should believe *Deum Creatorem*.

The most material question is, whether these witnesses are admittable by the laws of *England*?

I must own that the authorities are few, but I hope there is no exception to be shewn of the other side, and where it is a general rule, it comes rather of the other side to shew it has been varied.

No one of the instances Mr. Attorney General put of exceptions to the general rules, but where the witnesses were *primâ facie* admittable. The statute of Hue and Cry was made, that [38] persons might pass and repass safely in the kingdom. Robberies are committed oftener upon single persons than more, and there is in most instances no other method of proving the robbery but by admitting the evidence of the person robbed; therefore judges were inclined to let in this evidence upon necessity. It is not certain what the rule would be, in the opinion of judges, if a third person was by.

Lord Chancellor: *This evidence might be allowed notwithstanding, for a third person or servant might be at a distance, and not know the fact of the robbery so well as the person robbed.*

Mr. Chute: *The next instance is, as to letting in a tradesman's books kept by his servant*; but there the oath of a living person is to attest them.—The next, *of a wife in cases of treason*, but here is no authority cited, but it is said to be an opinion of Lord Chief Justice *Hale*.—The next instance brought is, *That the sayings of dying men may be given in evidence*. This is no more than giving evidence of a nuncupative will, and not so much

 words

OMYCHUND v. BARKER. words as evidence of circumſtances. A man, as he is juſt leaving the world, may be ſuppoſed to have a greater regard to truth; but on a trial for murder this kind of evidence will not alter the ſenſe of the court, if it ſhould appear the deceaſed was killed fairly: in Major *Oneby*'s caſe it was mentioned by the ſpecial verdict, that the dying man ſaid he was killed after the manner of ſwordſmen; but this had not weight enough to over-rule ſtronger evidence.

It is ſaid that *in matters of cuſtom and tradition, hear-ſay evidence is admitted*; and rightly ſo, for how can tradition be conveyed but from man to man through a ſuit of ages?

The caſe of a rape of a child, and her evidence being admitted without oath, was denied by Lord Chief Juſtice *Lee*, and Lord Chief Baron *Parker*, to be law, and therefore I ſhall not trouble you on that head.

A great deal of ſtreſs has been laid on Lord *Coke*'s putting *Jews* on a foot with Infidels; in other places Lord *Coke* calls him *an Infidel Jew*, therefore deſcribes him *ſecundum quid*, and not generally as an *Infidel*.

As to the authority from *Maddox*'s Hiſtory of the Exchequer, he determines generally that they ſhould be ſworn and by their own book, but it is not by force of a charter that they are ſworn.

After the reſtoration, when the *Jews* came over in great numbers, they were admitted to be ſworn; and this was doing no more than declaring what was the ancient law.

The *Jews* were once the people of God; great and atrocious crimes were forgiven them; they had certainly the promiſe of Scripture largely given them, and the *evangelium* is equally applicable to the *Jews* as to the Chriſtians—for the good tidings are not confined to the New Teſtament, the ſame being told ſo early as juſt after the fall; *Geneſis* the 3d and 15th. *And I will put enmity between thee and the woman, and between thy ſeed and her ſeed; it ſhall bruiſe thy head, and thou ſhalt bruiſe his heel.*

[39] As to the form of indictments, they ought to be adhered to; if there was nothing but conſcience to awe a perſon in taking an oath, I am afraid, from the depravity of mankind, it would not be ſo binding, for it is the apprehenſion of temporal puniſhment which in a great meaſure prevails upon perſons to ſpeak the truth.

There is no authority to ſhew that indictments have run otherwiſe than on the holy Evangeliſts, and ſaid in *Hall*'s caſe, that the Chriſtian religion is part of the law of *England*.

If there is a poſſibility that the *Jews* may be reconciled to the New Teſtament, it ought to have weight; and an author, the Charterhouſe *Burnet*, imagines they will; and as they believe a part of the Holy Scriptures, it muſt give them a ſuperior credit to perſons who do not believe at all in the ſame manner with us.

Suppoſe a Chriſtian ſhould turn apoſtate to the *Gentoo* religion, and ſhould ſay, I am not liable to be indicted? How muſt he be convicted of perjury, any more than a perſon who is a *Gentoo* from his birth? This might be attended with bad conſequences,

becauſe

becauſe perſons of this temper of mind, who are guarded againſt corporal puniſhments, will truſt futurity as to eternal puniſhments.

As to the objection of our bringing a croſs bill, and that we have thereby admitted the defendants capable of putting in an anſwer, it will of courſe fall to the ground, as we do not make any uſe either of *our croſs bill* or *their anſwers*.

As to the admitting the *Mahometan* as a witneſs before the committee of the council, it was done without debate upon it; for *Sabine's* counſel, who had a right to make the objection, were ſatisfied of the truth and juſtice of *Sabine's* cauſe, and therefore it paſſed without oppoſition; but as the judges ſit there rather as adviſers than in any other light, it wants the form of an authority.

Mr. Solicitor General mentioned a caſe which he had from Dr. *Strahan* and Dr. *Andrews*, where a Heathen was admitted as a witneſs, but the name is not ſo much as known. Dr. *Audley* and Dr. *Simpſon* have informed me, there was a caſe before the commons in a ſuit for a divorce, where a black was rejected as a witneſs, becauſe not of the Chriſtian religion.

As to the charter, nothing is ſaid there, but that a *proper oath* ſhall be given. A charter may be granted which may affect a place out of the kingdom totally, and yet may not infringe the general rule here with regard to ſwearing.

Like the common caſe of a Pie-powder court, which is a ſummary way of doing juſtice during the fair, and is confined to that particular time, but you cannot follow it afterwards.

That an act of parliament is neceſſary to diſpenſe with the form of an oath, appears from the 10th of the late king in relation to the *Jews*, this act being made to diſpenſe with their ſwearing upon the faith of a Chriſtian.

Therefore, if it ſhould be thought proper for reaſons of ſtate, and for the ſake of trade, to receive ſuch evidence for the future, let it be done by the legiſlature, and not admitted againſt an infant, where the plaintiff acquieſced for 4 years, till the perſon tranſacting with him was dead.

Lord Chancellor: My Lord Chief Juſtice, Lord Chief Baron, and myſelf are of opinion, the cauſe ſhould ſtand over till next term, that it may be properly conſidered, this being a point of the utmoſt conſequence; and in the mean time let a ſearch be made in the crown office for precedents of indictments of perjury, to ſee whether in the indictment of a *Jew* it has been laid *tacto libro legis Moſaicæ*, or whether there is any thing particular in the form with regard to the indictments of *Jews*; and as caſes have been mentioned in the admiralty (which is a court where ſuch caſes are moſt likely to happen) of Heathens being admitted to ſwear in their own form, I ſhould be glad to have inquiry made in that court likewiſe. [40]

February the 23d 1744.

This cauſe came on for judgment upon the point above mentioned.

Lord

OMYCHUND v. BARKER. *Lord Chief Baron:* The counsel for the defendant, in support of their objection to the plaintiff's evidence, cited 1 *Inst.* 16. and 4 *Inst.* 279. to shew, *That an Alien Infidel can be no witness.*

If my Lord *Coke* had by an Infidel meant, a *professed Atheist*, I should have been of opinion that he could not be a witness.

I shall shew that persons who profess the *Gentoo* religion believe a God to be the Creator of the world. The generality of mankind believe a God. *Tully* in his *Tusc. Disput. lib.* 1. *s.* 13. says, "*Quod nulla gens tam fera, nemo omnium tam sit immanis,* "*cujus mentem non imbuerit Deorum opinio*;" and expresses himself to the same effect in his Treatise *de Natura Deorum.*

As to the *Gentoo* religion, *vid. Relig. Cerem. vol.* 3. *p.* 257, 277, 381. and *Tournefort's Voyages, p.* 39, 259. from which it will appear from the best testimonies, that persons of this religion do believe in God as the creator and governor of the world.

The defendant's counsel cited 2 *Keble* 314. to shew that the Old Testament is the Gospel as well as the New, on one of which the law requires the oath should be administered.

To this I answer, that the ritual or ceremonial part of the *Mosaic* law is not binding, but the moral is, upon Christians; therefore I think the Old Testament cannot be called the Gospel.

As my Lord *Hale's* reason will be the basis of the advice I shall give your Lordship, I shall read the passage, and endeavour to comment upon it. *H. P. C.* 2 *vol.* 279.

It has been said by the defendant's counsel, that Lord *Hale* misunderstood Lord *Coke*; in answer to this, consider the 3d *Inst.* 165. and you will find Lord *Hale's* consequence is very well founded.

Lord *Hale* says, "*I take it that although the regular oath,* &c. "*is* tactis sacrosanctis Dei evangeliis, &c. *yet in cases of necessity,* "*as in foreign contracts, &c. the testimony of a Jew,* tacto libro "legis Mosaicæ, *is not to be rejected.*"

The books, cited by the defendant's counsel, to shew jurors or witnesses must be sworn upon the Gospel, were *Bracton, Britton, Fleta, &c.* These authors prove no more than that the oaths are adapted to the natives of the kingdom: But by *Maddox's* [41] History of the Exchequer, 166. and *Wilkins's Saxon* Laws, 348. it appears that *Jews* were also sworn; and in the latter author we find something very particular; a *venire facias* is mentioned to have issued to *sex legales homines, & sex legales Judæos.*

A doubt arose after the restoration in what manner a *Jew* should be sworn in putting in an answer. Upon a motion, Lord Keeper *North* ordered he should be sworn upon the Pentateuch, and that the plaintiff's clerk should be present to see him sworn. *Anon.* 1 *Vern.* 263. *vide* also *Francias's* Trial in the State Trials. 'Tis likewise the constant course in trials at bar and *nisi prius*, and, which is still stronger, there is an act of parliament to inforce it.

This overturns Lord *Coke's* opinion so far as *Jews* are concerned, and establishes Lord *Hales's*.

The

The next paſſage in Lord *Hale* relates to the ſpecial laws in *Spain*, *Yea the oaths of idolatrous infidels have been admitted in the municipal laws of many kingdoms, eſpecially* ſi juraverit per verum Deum Creatorem, *and ſpecial laws are inſtituted in Spain touching the form of the oaths of infidels.* OMYCHUND v. BARKER.

Conſider now whether there is not ſuch a neceſſity here as is ſufficient to render this evidence admiſſible.

An objection is made that the plaintiff ought to have ſhewn he could not have the evidence of Chriſtians.

To this I anſwer, that repugnant to natural juſtice, in the ſtatute of Hue and Cry, the robbed is admitted to be a witneſs of the robbery, as a moral or preſumed neceſſity is ſufficient: and that it ſhall be taken for granted there was the ſame neceſſity in the preſent caſe, as nothing is ſtated to the contrary. Beſides, it appears that the plaintiff did commence a ſuit in *Calcutta*, and obtained a decree there, and, what is very material, *Barker* himſelf, the father of the defendant, in that ſuit in the mayor's court, inſiſted that *Omychund* ſhould be aſked whether he was of the *Gentoo* religion, and that he ſhould be ſworn according to his own notion of an oath, which was done accordingly. This certainly bound *Barker*, and of courſe his repreſentative. *Vide 2 Roll's Rep.* 346. 1 *Salk.* 283.

In ſhort, I do not ſee what ſhould hinder admitting them as witneſſes. They are admitted by the civil law—by the law of nations—by the common conſent of mankind. (He then cited all the caſes mentioned by plaintiff's counſel, and Lord *Stairs*'s Inſtitute, to ſhew what the law of *Scotland* was in this particular.) Heathens admitted as witneſſes by the civil law, by the law of nations, and by the common conſent of mankind.

But it is objected, that theſe witneſſes do not ſwear by the true God, and for this purpoſe, the defendant's counſel cited *Deuteronomy* vi. 13 and 14 *verſ. Thou ſhalt fear the Lord thy God, and ſerve him, and ſhalt ſwear by his name. Ye ſhall not go after other gods, of the gods of the people which are round about.*

Of the other ſide, *Jacob*, upon his covenant with *Laban*, *ſwore by the fear of his father Iſaac*, Gen. 31. v. 53.

My anſwer is, This is not true in fact, for they do ſwear by the true God, the Creator of the world.

Lord *Hale* ſays, *a proviſion by the laws of* Spain *for* Moors, *and oaths particularly adapted to the religion of the Mahometans:* but here the oath taken by theſe witneſſes, is the conſtant oath, and taken in their own manner exactly. [42]

Lord *Hale* makes a queſtion, *Whether a Turk or a Jew may be admitted to give evidence upon a murder.* I will not give a preciſe opinion, but I think *a Jew* a very competent witneſs to prove a murder. *A Jew a competent witneſs to prove a murder.*

Next as to the form of the oath.

I am very far from ſaying that this is ſo ſolemn and ſignificant as ours is.

The Scripture has upon this occaſion been cited, and I will therefore mention the opinion of a very great divine, *Tillotſon* in his aſſize ſermon, 1 vol. fo. 194. *The form of an oath is voluntarily taken up and inſtituted by men.*

In

OMYCHUND v. BARKER.

In the cafe of *Dutton* v. *Colt*, 1 *Sid.* 6. Doctor *Owen* vice chancellor of *Oxford* being a witnefs for the plaintiff, refufed to be fworn in the ufual manner, by laying his right hand upon the book, and by kiffing it afterwards; "but he caufed the book "to be held open before him, and he lifted up his right hand: "the jury upon this prayed the opinion of the court, if they "ought to think this teftimony as ftrong as the teftimony of ano- "ther witnefs; and *Glin* Chief Juftice told them, that in his judg- "ment he had taken as ftrong an oath as any other witnefs, but "faid, if he was to be fworn himfelf, he would lay his right "hand upon the book."

By the policy of all countries, oaths ought to be adminiftered to perfons according to their own opinion, and laying the hand originally borrowed from the Pagans.

That forms are various, *vid. Selden*, *T.* 2. 1467, and *Voet's Pand.* Chriftians were fworn fometimes without laying their hands upon the gofpel, by lifting up their hands to heaven: *Jews* were fworn firft with rites and ceremonies, afterwards without any. It is plain that by the policy of all countries, oaths are to be adminiftered to all perfons according to their own opinion, and as it moft affects their confcience, and laying the hand was originally borrowed from the Pagans.

It is faid by defendant's counfel, that no new oath can be impofed without an act of parliament, and for this purpofe feveral cafes cited.

My anfwer is, This is no new oath.

It was objected, that they ought not to be admitted as witneffes from the perpetual enmity between Heathens and Chriftians, upon the authority of *Calvin*'s cafe, 7 *Rep* 17. and the ftatute of the 21 *H.* 8.

That Turks and Infidels are *perpetui inimici*, and therefore not to be admitted witneffes here, is a common error founded on a groundlefs opinion of juftice *Brooke*.

This is to be underftood of fpiritual difcord only: Sir *Edward Littleton* Lord Keeper, in his readings upon the ftatute of the 27 *Ed.* 3. has fentiments there worthy of a great Chriftian writer: "*Turks* and Infidels, faith he, are not *perpetui inimici*, nor is there a particular enmity between them and "us; but this is a common error founded upon a ground- "lefs opinion of juftice *Brooke*; for though there be a dif- "ference between our religion and theirs, that does not "oblige us to be enemies to their perfons: they are the "creatures of God, and of the fame kind as we are, and it "would be a fin in us to hurt their perfons." *Salk.* 46.

[43]

The neceffity of trade has mollified the too rigorous rules of the old law, in their reftraint of aliens.

A Jew may bring an action now, tho' held otherwife formerly.

In *Wells* v. *Williams*, 1 *L. Raym.* 282. The court faid, "That the neceffity of trade has mollified the too rigorous rules "of the old law, in their reftraint and difcouragement of aliens: "A *Jew* may fue at this day, but heretofore he could not; for "then they were looked upon as enemies, but now commerce "has taught the world more humanity; and therefore held that "an alien enemy, *commorant* here by licence of the king, and "under his protection, may maintain debt upon a bond, though "he did not come with fafe conduct."

It was objected by the defendant's counfel, that this is a novelty, and what has never been done, ought not to be done.

The law of *England* not confined to particular cafes, but governed more by reafon, than any one cafe whatfo-

The law of *England* is not confined to particular cafes, but is much more governed by reafon, than by any one cafe whatever. The true rule is laid down by Lord *Vaughan*, fol. 37, 38. "Where the law, faith he, is known and clear, tho' it be un-

2 "equitable

" equitable and inconvenient, the judges must determine as the " law is, without regarding the unequitableness or inconveniency: " those defects, if they happen in the law, can only be remedied " by parliament; but where the law is doubtful, and not clear, the " judges ought to interpret the law to be, as is most consonant to " equity, and least inconvenient."

OMYCHUND v. BARKER.

As to the case of *Lee* v. *Lee*, before the court of delegates in 1692. They gave no opinion whether the witnesses were admittable or not?

The counsel for the defendant mentioned a note of a case taken by Mr. *Bunbury* in the court of exchequer, in a cause between the *East India* company and admiral *Matthews*, " Where " *Orangee* a black being offered as a witness there, said he looked " upon *Jesus Christ* as a good man, and upon sending to the king's " bench for their opinion, they thought he could not be admitted, " because he did not believe in *Jesus Christ*."

This was a note of a case taken some time after the cause was heard, upon memory only, which at a distance of time is very treacherous, but I think the reason a very bad one, for the same would exclude *Jews*.

Another objection is, That the witnesses are not liable to a prosecution for perjury.

This is not true in fact; but supposing it was, yet this is not the only case where witnesses cannot be prosecuted, for there is no possibility of prosecuting them, where the depositions are taken out of *England*; but if they were here, I should be of opinion, they might be indicted upon a special indictment, for I do not think *tactis sacris evangeliis* are necessary words, for several old precedents are, that the party *was *juratus generally*, or *debito modo juratus*. *Vide West's Symb.* 2d *part*, under the head of Indictments and Offences, *sec.* 160.

If these witnesses were here, liable to a prosecution for perjury, and might be indicted upon a special indictment. *Tactis sacris evangeliis* not necessary words in an indictment of perjury, for several old precedents are, that the party was *juratus generally*.

[*44] As to the precedents of indictments against *Jews*, they are so various that nothing is to be drawn from it: upon the whole, not to admit these witnesses would be destructive of trade, and subversive of justice, and attended with innumerable inconveniences.

Lord Chief Justice Willes: As it is a question of great importance, and in some measure a new question, I will give my opinion, first, as to the general question: Whether any Infidel may be admitted as an evidence under some circumstances.

If I was of the same opinion with Lord *Coke*, the consequence would be, that these depositions could not be read; but I am of opinion that some Infidels may under some circumstances be admitted as witnesses.

Some Infidels may, under some circumstances, be admitted as witnesses.

My Lord *Coke* is plainly of opinion, that *Jews* as well as Heathens were comprized under the same exclusion.

Serjeant *Hawkins* in his *Pleas of the Crown*, though a very learned and pains-taking man, is mistaken in his notion of Lord *Coke*'s opinion; long before his time, and ever since the *Jews* returned to *England*, they have been constantly admitted as witnesses.

The Jews before their expulsion from *England*, and since their return to it, have been constantly admitted as witnesses.

The

Omychund v. Barker.

The defendant's counsel are mistaken in their construction of Lord *Coke*, for he puts the *Jews* upon a footing with stigmatized and infamous persons: this notion, though advanced by so great a man, is contrary to religion, common sense, and common humanity; and I think the devils themselves, to whom he has delivered them, could not have suggested any thing worse.

Our Saviour and St. *Peter* have said, *God is no respector of persons.* Acts 10. ver. 34.

Lord *Coke* is a very great lawyer, but our Saviour and St. *Peter* are in this respect much better authorities, than a person possessed with such narrow notions, which very well deserves all that Lord *Treby* has said of it.

I lay no stress upon the authority of *Bracton*, *Briton*, and *Fleta*, for they lived in popish times, when no other trade was carried on except the trade of religion; and I hope such times will never come over again: it is very plain too, these ancient authorities speak only of Christian oaths.

Maddox's History of the Exchequer clears it up beyond all contradiction, that *Jews* were constantly sworn, and from the 19 *Car.* 1. to the present time, have never been refused.

To this assertion of Lord *Coke*, I will oppose Lord *Hale*, though fully cited by Lord Chief Baron *Parker*; yet I will mention it again, because it is full of the true spirit of good sense and Christianity, and *decies repetita placebit.*

As to the authority of civilians, I shall say once for all, that I do not lay so much stress upon any quotations of the civil law; because I think there is no occasion to have recourse to them.

[45] The last answer I shall give to Lord *Coke*'s assertion are his own words in *Calvin*'s case and 4th Inst. *If, said he, an oath was clearly of a Christian institution, then I should be forced to admit, that it could not be allowed.*

Oaths are not of Christian institution, but as old as the creation.

But oaths are as old as the creation; look into sacred history, and you will find variety of instances, in the book of *Genesis*, in the 30th chapter of *Numbers* throughout.

The nature of an oath is not at all altered by Christianity, but only made more solemn from the sanction of rewards and punishments being more openly declared.

The passage in the 14th chapter of St. *Matthew*, relating to *Herod* and the daughter of *Herodias* is very extraordinary; a person appears there to be so very wicked as not to stick at murder, and yet thought an oath of such a sacred nature, as to choose rather to commit the former than break the latter.

Pythagoras in his golden verses, and *Tully* in several parts of his works, speak of an oath with the highest reverence, *Grotius de Jure Belli et Pacis*, 1 *vol. lib.* 2. *c.* 13. *de jurejurando*, 1 *sec. apud omnes populos, et ab omni Ævo circa pollicitationes, promissa et contractus maxima semper vis fuit jurisjurandi.*

The form of oaths varies in countries according to different laws and constitutions, but the substance is the same in all.

Grotius in the same chapter, sect. 10. *Forma jurisjurandi verbis differt, re convenit, hunc enim sensum habere debet, ut Deus invocetur,*

vocetur, puta hoc modo, Deus testis sit, aut Deus sit vindex. In our old law books *sic Deus adjuvet*, and other expressions of the like nature, and now, *So help me God. Vid.* the 23d of *Matthew*, 20th, 21st, and 22d verses. Omychund v. Barker.

There is nothing in the argument, that as Christianity is the law of *England*, no other oath is consistent with it; and for the reasons already given, this argument carries no weight with it.

Though I have shewn that an Infidel in general cannot be excluded from being a witness, and though I am of opinion that infidels who believe a God, and future rewards and punishments in the other world, may be witnesses; yet I am as clearly of opinion, that if they do not believe a God, or future rewards and punishments, they ought not to be admitted as witnesses.

If infidels do not believe a God, or rewards and punishments hereafter, they ought not to be admitted.

Next as to dispensing with strict rules of evidence: Such evidence is to be admitted as the necessity of the case will allow of, as for instance, a marriage at *Utrecht* certified under the seal of the minister there, and of the said town, and that they cohabited for two years together as man and wife, was held to be a sufficient proof they were married. *Cro. Jac.* 541. *Alsop* v. *Bowtrel*.

The rule of evidence is, that such ought to be admitted as the necessity of the case will allow of, but though admitted, must be left to the persons who try the cause to give what credit to it they please.

It must be left to the jury or judge what credit they will give; for it is a known distinction, that the evidence, though admitted, must still be left to the persons who try the cause, to give what credit to it they please.

The same credit ought not to be given to the evidence of an infidel, as of a Christian; because not under the same obligations.

It is admitted by the defendants that this cause relates to a mercantile affair between *Barker* a merchant and a subject of *England*, and an *Indian*, a merchant, and the subject of the *Grand Mogul*. [46]

What could the plaintiff do? He had but only one remedy, that he takes, he follows his debtor into *England*.

There can be no evidence admitted without oath, it would be absurd for him to swear according to the Christian oath, which he does not believe; and therefore, out of necessity, he must be allowed to swear according to his own notion of an oath.

Persons who do not believe the Christian oath, must, out of necessity, be allowed to swear according to their own notions of an oath.

Next as to the commission: the certificate fully answers this objection, *that it does not appear they believe a God.*

I cannot say I lay a great stress upon the authors which give an account of the *Gentoo* religion, because it must depend upon their veracity and private judgment; but I found my opinion upon the certificate, which says, the *Gentoos* believe in a God as the Creator of the universe, and that He is a rewarder of those who do well, and an avenger of those who do ill.

And lastly, As to the objection of the indictment for perjury.

This has been fully answered already by the Lord Chief Baron, but the plain answer is, that *sacro-sancta evangelia* are not at all material words.

Upon

Omychund v. Barker.

Upon the whole, I am of opinion, the evidence of the plaintiff's witnesses, under the circumstances of this case, ought to be admitted.

Lord Chief Justice Lee: I agree intirely with the opinion of Lord Chief Baron *Barker*, and Lord Chief Justice *Willes*; that where it is returned by the certificate the witness is of a religion, it is sufficient; for the foundation of all religion is the belief of a God, though difficult to have a distinct idea of an infinite and incomprehensible Being as God is; yet mankind may have a relative idea of the being of a God, as dependent creatures upon Him.

Rules of evidence are to be considered as artificial rules, framed by men for convenience in courts of justice, and founded upon good reason.

An oath is a religious sanction that makind have universally established. I would not be thought to declare an opinion, how far persons under the denomination of Atheists, and believing no religion, may in this country be in some cases admitted, but I do apprehend, that the rules of evidence are to be considered as artificial rules framed by men for convenience in courts of justice, and founded upon good reason: But one rule can never vary, *viz.* the eternal rule of natural justice. This is a case that ought to be looked upon in that light, and I take it, considering evidence in this way, is agreeable to the genius of the law of *England.*

Hearsay cannot be admitted, nor husband and wife as witnesses against each other, and yet from necessity have been allowed.

There is not a more general rule, than that hear-say cannot be admitted, nor husband and wife as witnesses against each other, and yet it is notorious that from necessity they have been allowed; and as Lord Chief Baron said, Not an absolute necessity, but a moral one.

[47]

The rule as to admitting evidence in foreign and commercial matters, differs from other instances in courts of justice.

Where there are foreign parties interested, or in commercial matters, the rules of evidence are not quite the same, as in other instances in courts of justice, the case of Hue and Cry, *Brownlow* 47. In Lord Chief Justice *Hale*'s Pleas of the Crown, *vol.* the 1st, 301. a feme covert is not a lawful witness against her husband in cases of treason, but has been admitted in civil cases: a wife admitted to prove a theft: the same as to hear-say evidence. *Skinner* 647.

As to admitting evidence in foreign matters and commercial, this is different from common cases. 2 *Rolls Rep.* 346.

Lord Chief Justice *Lee* of opinion, if the validity of a foreign contract made in the presence of a public notary was in question here, that his testimony would be allowed to authenticate the contract.

The testimony of a public notary is evidence by the laws of *France*; contracts are made in the presence of a public notary, and no other witness necessary to prove the transaction: I should think it could be no doubt at all, if it came in question here whether this was a valid contract, but a testimony from persons of that credit and reputation would be received as very good proof in foreign transactions, and would authenticate the contract, *Cro. Car.* 365. These cases shew that courts always govern themselves by these rules, in cases of foreign transactions. *Preced. in Chanc.* 207. *Tremoult* v. *Dedire.* 1 *Wms.* 429. In actions of trover, *vid. Comberb.* 340, 366. *Dockway* and *Dickenson.* In cases of sales of goods a factor is admitted as a witness.

To apply these cases to the present, without delivering an opinion, Whether persons that do not believe in any religion may be admitted; as I think that these witnesses are under the religious

gious tye of an oath, administered in the most solemn manner; as this is a transaction wholly in the country of the *Mogul*; as *Barker* has forced the plaintiffs to have recourse here to the law of *England*, by quitting a country where, by the letters patent of the crown, they were intitled to justice, it would not be consonant to natural equity to deny them the benefit of this evidence. OMYCHUND v. BARKER.

In the 13th and 14th of *Cha.* 2. *chap.* 11. *sect.* 29. an act for preventing frauds and regulating abuses in his Majesty's customs, there is the following clause: "Provided, that in case the seizure or information shall be made upon any clause or thing "contained in the late act, intitled, An act for the encouraging "and encreasing of shipping and navigation, that then the defendant or defendants shall, on his or their request, have a "commission out of the high court of Chancery, to examine "witnesses beyond the seas, and have a competent time allowed "for the return thereof, before any trial shall be had upon the "case, according to the distance of place where such commission or commissions are to be executed, and that the examination of witnesses so returned shall be admitted for evidence in "law at the trial, as if it had been given *vivâ voce*, by the examinate in court; any law, statute, or usage to the contrary "in any wise notwithstanding."

Lord Chancellor: As this is a case not only of great expence, but of great consequence, it will be expected that I should not give an opinion without assigning my reasons for it at the same time. [48]

First, As to the objection of the defendant's counsel to the certificate and return of the commission, *that the commissioners have not followed the direction of this court; that they should have certified of what religion the witnesses were, and the principles of that religion; whereas they only certify them to be of the Gentoo religion, without shewing what the principles are of that religion:* It was not the intention of the court they should, for it would have been entering into a wide field, and would have been certifying the history of the *Banian* or *Gentoo* religion.

Cases have been determined at common law upon evidence taken from histories of countries, and we have very authentic accounts of this part of the world. A general history is evidence to prove a matter relating to the kingdom in general. 1 *Salk.* 281. Cases determined at law upon evidence taken from histories of countries.

My intention was to be certified whether these people believed the being of a God, and his providence. The 6th volume of *Churchill's Voyages* 301. particularly describes this religion and their precepts of morality; the latter precept carries almost the sense of the ninth commandment.

This objection being removed, the next question will be, whether the depositions ought to be read; which depends upon two things:

First, Whether it is a proper obligatory oath?

Secondly, Whether, on the special circumstances in this case such evidence can be admitted according to the law of *England*?

The general learning upon this head has been fully enlarged upon by the Lord Chief Justice.

OMYCHUND v. BARKER.

The effence of an oath is an appeal to the Supreme Being, as thinking him the rewarder of truth, and avenger of falfhood; and Lord *Coke* the only writer who has grafted the word *Chriſtian* into an oath.

The firſt author I ſhall mention is Biſhop *Sanderſon de jurisjuramenti obligatione. Jurisjuramentum*, ſaith he, *eſt affirmatio religioſa:* All that is neceſſary to an oath is an appeal to the Supreme Being, as thinking him the rewarder of truth, and avenger of falſhood; *vid.* the ſame author, *p.* 5. and 18.

This is not contradicted by any writer that I know of but Lord *Coke*, who has taken upon him to inſert the word *Chriſtian*, and is the only writer that has grafted this word into an oath. As to other writers they are all concurring, *vid Puffendorff, lib.* 4. *ch.* 2. *ſec.* 4. Dr. *Tillotſon*, 1ſt volume of his ſermons upon the lawfulneſs of oaths, and *p.* 189, where the very text ſpeaks plainly of an oath among all nations and men, "An oath for confirmation "is to them an end of all ſtrife," *Hebr.* the 6th and 16th. "The "neceſſity of religion to the ſupport of human ſociety in nothing "appears more evidently, than in this, That the obligation of "an oath, which is ſo neceſſary for the maintenance of peace and "juſtice among men, depends wholly upon the ſenſe and belief "of a Deity."

The outward act is not eſſential to the oath, for this was always matter of liberty.

The next thing I ſhall take notice of is the form of the oath.

It is laid down by all writers that the outward act is not eſſential to the oath; *Sanderſon* is of that opinion, and ſo is *Tillotſon* in the ſame ſermon, *p.* 144. "As for the ceremonies in "uſe among us in the taking of oaths, it is no juſt exception "againſt them, that they are not found in Scripture, for this "was always matter of liberty, and ſeveral nations have uſed "ſeveral rites and ceremonies in their oaths."

[49]

All that is neceſſary appears in the preſent caſe: an external act was done to make it a corporal act.

Secondly, Whether upon ſpecial circumſtances ſuch evidence may be admitted according to the law of *England?*

The judges and ſages of the law have laid it down that there is but one general rule of evidence, *the beſt that the nature of the caſe will admit.*

The rule is, that if the writings have ſubſcribing witneſſes to them, they muſt be proved by thoſe witneſſes.

An abſolute neceſſity the firſt ground for departing from ſtrict rules of evidence, a preſumed neceſſity the ſecond.

The firſt ground judges have gone upon in departing from ſtrict rules, is an abſolute ſtrict neceſſity. *Secondly*, a preſumed neceſſity. In the caſe of writings, ſubſcribed by witneſſes, if all are dead, the proof of one of their hands is ſufficient to eſtabliſh the deed: where an original is loſt, a copy may be admitted; if no copy, then a proof by witneſſes who have heard the deed, and yet it is a thing the law abhors to admit the memory of man for evidence. 1 *Mod.* 4.

A tradeſman's books are admitted as evidence, though no abſolute neceſſity; but by reaſon of a preſumption of neceſſity only, inferred from the nature of commerce.

As to admitting hear-ſay evidence, ſee the caſe of *Campoverde. Mich.* the 2d of *Q. Anne*, in an action upon a policy of inſurance. There is another inſtance of diſpenſing with the lawful oath, where our courts admit evidence for the crown without oath.

It is a common natural preſumption that perſons of the *Gentoo* religion ſhould be principally apprized of facts and tranſ-

actions

actions in their own country; there is a stronger presumption of necessity here than for admitting a deed of 30 years standing. Besides all this an additional reason is, that the parties who entered into this contract presumed, that if they should be obliged to sue, it would be in their own country, and then they must have been admitted. From hence it follows, that if one of the parties should leave this country and change his domicil, the other would be deprived of his evidence, which would have been admitted there, and by that means deprived of justice. OMYCHUND v. BARKER.

As the *English* have only a factory in this country (for it is in the empire of the *Great Mogul*), if we should admit this evidence, it would be agreeable to the genius of the law of *England*. The courts of admiralty have done it *Carth.* 31. *Beak v. Tyrrell*, *vid.* the last *section*, "*An* English *ship was taken by a* "French *man of war under colour of a* Dutchman, *and carried into* "France, *and there condemned by their court of admiralty as a* Dutch "*prize*; *afterwards an* English *merchant bought this ship of the* "French, *and conveyed her into* England, *where the right owner* "*brought an action of trover for the ship against the purchaser*; *and* "*all this matter being found specially, the defendant had judgment,* "*because the ship being legally condemned as* Dutch *prize, this court* "*will give credit to the sentence of the court of admiralty in* France, "*and take it to be according to right, and will not examine their proceedings*: *for it would be very inconvenient, if one kingdom should* "*by peculiar laws correct the judgments and proceedings of the courts* "*of another kingdom.*"

Courts of law here will give credit to the sentence of a foreign court of admiralty, and take it to be right, without examining their proceedings.

And if we did not give this credence, courts abroad would not allow our determinations here to be valid. [50]

So in matrimonial cases, they are to be determined according to the ceremonies of marriage in the country where it was solemnized.

Suppose a Heathen, not an alien enemy, should bring an action at common law, and the defendant should bring a bill for an injunction, would any body say that the plaintiff at law should not be admitted to put in an answer according to his own form of an oath? If otherwise, the injunction must be perpetual, and this would be a manifest denial of justice.

If a Heathen, not an alien enemy, brings an action, and defendant a bill for an injunction, he shall be admitted to answer according to his own form of an oath.

As to the most material objection of the form in indictments for perjury, the words *supra sanctum Dei evangelium* are not at all necessary. The framers of indictments are apt to throw in words, and to swell them out too much to no purpose; therefore the old precedents are the best; and besides, as has been very justly said, this would prove too much, for it would hold as well to all depositions taken abroad. It has been said by the counsel for the defendant, that the special laws in *Spain*, for taking those oaths, are of the nature of our acts of parliament. I will not be positive, but I take it to be otherwise. *Selden* upon the laws of *Alphonso* the wise, king of *Arragon*, saith, *It is not a positive law for the Moors, but authenticated by him, and transferred into his code of laws, and originally in the nature of what our common law*

Framers of indictments multiply words to no purpose, therefore the old precedents are the best, and by them it appears *supra sanctum Dei evangelium* are not necessary words in indictments for perjury.

OMYCHUND v. BARKER. *law is. Moors have their particular oath which they ought to make in that manner.* This form of expression rather shews that he refers to some other law that prevailed long before.

This falls in exactly with what Lord *Stair*, *Puffendorf*, &c. say, that it has been the wisdom of all nations to administer such oaths, as are agreeable to the notion of the person taking, and does not at all affect the conscience of the person administring, nor does it in any respect adopt such religion: it is not near so much a breaking in upon the rule of law, as admitting a person to be an evidence in his own cause.

The case of the *East-India* Company and admiral *Matthews*, in the court of Exchequer misstated, for there is no such thing as sending one judge out of a court to the judges of another upon a point of evidence.

I will just take notice of the case of the *East-India* Company, and Admiral *Matthews*. I was counsel myself in the cause, but do not at all remember sending either to the court of King's Bench, or Common Pleas, for their opinion. Mr. *Bunbury* has stated it as a trial at bar before Lord Chief Baron *Reynolds*, and therefore it could not be done, for there is no such thing as sending one judge out of a court to the judges of another upon a point of evidence. As to the case before Lord Chief Justice *Eyre*, the person there would not be sworn either upon the Old or New Testament; and therefore as he was not a *Christian*, he would not admit him to be a witness: but, upon the special circumstances of this case, I concur in opinion with my Lords the Judges, that the depositions of these witnesses ought to be read as evidence in this cause, and do therefore order that the objection be over-ruled, and the depositions read.

[51]

Ramkissenseat v. *Barker* and others.

November the 24th 1737.
Case 11.
Ante 19. S. C.
A bill brought for an account against the representatives of an *East India* governor, who pleaded that the plaintiff was an alien born, and alien infidel, and could have no suit here.

IT came on upon the joint pleas of the widow, and the son of the late Mr. *Barker*, governor of *Patna* in the *East Indies*, who had in his life-time employed the plaintiff in private trade, as his banyan or broker: they being made defendants to a bill brought against them as the representatives of *Barker* for an account; it was pleaded that the plaintiff was *an alien born*, and *an alien infidel*, not of the Christian faith, and upon a cross bill incapable of being examined upon oath, and therefore disqualified from suing here.

The plea over-ruled, for being a mere personal demand, the plaintiff may bring in a bill in this court.

Lord Chancellor said, as the plaintiff's was a mere personal demand, it was extremely clear that he might bring a bill in this court; and over-ruled the defendants' plea, without hearing one counsel of either side.

CAP. IX.

Amendment.

(A) In what Case allowed or not.

March 24th, 1738. The last seal after *Hilary* Term.

Anon.

Case 12.

After publication plaintiff cannot amend without withdrawing his replication.

IT was said by *Lord Chancellor:* That after publication is past, there is no instance of a plaintiff's obtaining an order to amend his bill, without withdrawing his replication (1).

(1) See *Goodwin* v. *Goodwin, post.* 3 *vol.* 370, 371.

CAP. X.

Answers Pleas, and Demurrers. [52]

(A) What shall be a good Plea and well pleaded.

Hilary Term, 1735. February 8th.

Chamberlain v. *Knapp.*

Case 13.

Lands devised to be sold for payment of debts. Bill brought by a creditor of testator against his widow, to discover her title to lands in her possession.

A Will having been made for the sale of lands for payment of debts, the present bill was brought by a creditor against the widow of the testator in possession of some of the lands devised, praying a discovery of her title.

She pleads a settlement and jointure, and offers to discover if plaintiff will confirm it, but neither sets out the date, nor lands contained in the settlement.

She pleads, that by a deed of settlement she had a jointure of all the lands laying in a town called and that she was willing to make a discovery, if plaintiff would confirm her jointure, not otherwise (1); the plea did not set out, either the date of the deed, or the particular parcel of the lands contained in it.

The plea over-ruled, for she ought to have set forth both these matters.

Lord Chancellor held the plea bad, for both these reasons, and that a purchaser for a valuable consideration would be bound to set forth those two matters. Plea over-ruled.

(1) See Lord *Portsmouth* v. Lady *Effingham*, 1 *Ves.* 430. *Leech* v. *Trollop*, 2 *Ves.* 662. *Stackhouse* v. *Earl*, 2 *Ves.* 450. *Ford* v. *Peering*, *Ves.* junr. 76.

February the 8th, 1737.

Duncalf v. *Blake.*

Case 14.

THE plaintiff subscribed a policy of insurance for a considerable sum of money; the ship was lost, and, as suggested, fraudulently, and with a view of charging the plaintiff with the policy.

DONCALF v. BLAKE.

An insurer by his bill suggests the ship was lost fraudulently, and in the charging part mentions that, instead of proper goods, there was only wool on board; and in the interrogatory part, prays defendant may set out what kind of goods he had on board.

The bill sets forth, that the ship, instead of having proper mercantile goods on board, being bound from one of the ports of *Ireland*, to one of the ports in *France*, had only wool on board: By the interrogatory part of the bill it was prayed; that the defendant might set out what kind of goods he had on board, what the invoices were, in what manner the ship was cleared, and whether she had not arms on board her.

[53]

Defendant pleads several statutes that make it penal to export wool, in bar to a discovery of all kind of goods on board.

The defendant, as to so much of the bill as sought a discovery of the particular nature and quanity of the goods mentioned to be shipped on board the said ship to be sent to *France*, and what quantity, pleaded an act of parliament of 1 *Will. & Mar. That no wool shall be shipped from* Ireland, *or imported from thence to any port but* Liverpool, *and some others in* England; which was afterwards made perpetual by the 7 *Will. & Mar.* and by another act made the 10 & 11 *W.* 3. it is enacted, That none *shall directly or indirectly export from* Ireland *into any foreign dominion any wool, and all offenders against this act are made liable to the forfeiture of the said wool, and also to a forfeiture of* 500 l. *for every offence* That the value of the cargo on board the said ship, and insured by plaintiffs, is by the policy ascertained at 3500*l.* by the sum insured thereon, and therefore it can no ways concern the plaintiffs to know the particulars of the goods; but the discovery thereof may occasion several forfeitures, and the bill charging that the goods shipped on board, &c. by the defendant, were to be sent to *Pontrasse* in *France*, which by the laws and statutes of this realm is prohibited, and highly penal, and the discovery manifestly tending to draw in the defendant to accuse himself; he submitted, Whether he should be compelled to make any other answer.

The Attorney General for the plaintiff admitted, that, in the charging part of the bill, nothing was mentioned to be on board but wool; but, by the interrogatory part, defendant is asked in general, What kind of goods he had on board? and defendant's plea goes in bar to a discovery of all kinds of goods which were on board.

The plea allowed, because no goods but wool mentioned in the charging part, if there had been others, defendant must have given some answer to it.

Lord Chancellor allowed the plea (1); but agreed, if other kind of goods had been mentioned in the charging part, the defendant might have been obliged perhaps to have given some answer to it, but as there was not, defendant was not obliged to answer that interrogatory part: The only doubt he had was as to the clearing of the ship, and having arms on board, and that part of the bill he thought afterwards might be covered with the plea.

Agreed in this case, that a plea may be bad in part, and yet not so in the whole (2).

(1) See *Harrison* v. *Southcote*, *post* 528. and the cases cited there in note under page 539.

(2) Earl of *Suffolk* v. *Green*, *post* 451. *Harrison* v. *Southcote*, *post*. 539. Earl of *Derby* v. Duke of *Athol*, 1 *Vef.* 205. *East India Company* v. *Campbell*, *ibid.* 247. *Finch* v. *Finch*, 2 *Vef.* 492. Bishop of *Sodor* and *Man* v. Earl of *Derby*, *ibid.* 357.

Deggs v. *Colebrooke.* — *February* the 19th, 1738.

Vide title *Costs.*

Morgan v. *Morgan.* — *March* the 3d, 1738.

Case 15.

IT was in this case laid down by *Lord Chancellor* as a rule, that where a defendant pleads a decree of dismission of a former cause, for the same matters, in bar of the plaintiff's demand on his new bill, if the plaintiff does not apply to the court, [54] that it may be referred to a Master to state, whether there is such a decree, but sets down the cause upon the new bill for hearing, it is a waiver of his right of application for such reference, and the court will determine it.

Chapman v. *Turner.* — *August* the 9th, 1739.

Case 16.

The defence proper for a plea must be such as reduces the cause to a particular point, and from thence creates a bar to the suit, and every good defence in equity is not likewise good as a plea.

LORD *Chancellor*: The defence proper for a plea must be such as reduces the cause to a particular point (1), and from thence creates a bar to the suit, and is to save the parties expence in examination, and it is not every good defence in equity that is likewise good as a plea; for where the defence consists of a variety of circumstances, there is no use of a plea, the examination must still be at large, and the effect of allowing such a plea, will be, that the court will give their judgment on the circumstances of the case, before they are made out by proof (2).

(1) *Whitbread* v. *Brockhurst*, 1 *Bro. Cha. Rep.* 417.

(2) *Brownsword* v. *Edwards*, 2 *Ves.* 247.

C A P. XI.

Apprentice.

Vide title *Master and Servant.*

C A P. XII.

Arrest.

(A) *Where good though on a* Sunday.

Ex parte Kerney. — *December* the 22d, 1744.

Case 17.

Q. If a man is liable to be arrested while under the summons of commissioners of bankrupts.

THE petitioner, who had been an assignee under a commission against *Philip Sheban*, was discharged by order of *Lord Chancellor*, and directed to convey to new assignees, and

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to account seven days after he had conveyed to the new assignees, and passed his accounts; but being an incumbred person, he begged the commissioners would give him their summons for the next sitting under the commission; the commissioners told
[55] him, that as he had done every thing that was necessary in pursuance of *Lord Chancellor's* order, it would be of no use to him; but however upon his importunity they did give him their summons.

Kerney attended on the day mentioned in the summons, and was examined two hours; as he was returning home, one *Lawn* a sheriff's officer arrested him, and notwithstanding *Kerney* shewed him the commissioners' summons, he damned it, and said he did not regard it of a farthing, and kept him in custody several hours.

The petitioner now applies to *Lord Chancellor* to be discharged from the arrest, and that the officer may be censured for his abuse of the commissioners' warrant of summons.

Lawn the sheriff's officer admits the arrest in his affidavit, but denies his abusing the summons.

Lord Chancellor: I think this a matter of great consequence.

1st, Material as to commissioners of bankrupt in general.

2dly, Material with regard to the liberty of the subject.

3dly, Material in other commissions under the great seal, as of charitable uses, commissions of lunacy, *&c.* for sham arrests may be set up, even by the persons themselves, in order to prevent their attendance to be examined as witnesses before such commissioners.

Ordered, That *Charles Lawn*, before the next day of petitions, give security, to be approved of before a Master, for his attending *de die in diem*, to answer interrogatories to be exhibited concerning the contempts charged upon him in the affidavit of the petitioner, late assignee of *Philip Shehan*. And if *Lawn* should not give such security, ordered, he should stand committed to the *Fleet* for the said contempts; and if *Lawn* shall give such security, then ordered that the petitioner do within a week after such security exhibit interrogatories before the Master, for examining *Lawn* touching the said contempts, and that *Lawn* do attend the said Master *de die in diem* for that purpose.

And as no precedents have been produced of like cases before the court, of arrests, notwithstanding commissioners' warrant, tho' it very probably may have happened; let the petition stand over till the next day of petitions, and a search be made for such cases, and what the court have done upon it; and in the mean time recommended it to the counsel for the sheriff's officer, to advise him to discharge the petitioner (1).

(1) See *Ex parte Dick*, and *Ex parte Stow*, 2 *Black. Rep.* 1142.

Ex parte Whitchurch. *June* the 2d, 1749.

Case 18.

The petitioner was arrested on a *Sunday* by *Lord Chancellor's* tipstaff, under a warrant of the court for a contempt in disobeying an order; he now prayed to be discharged, insisting his arrest and commitment to the *Fleet* was illegal, being contrary to the statute of the 29 *Car.* 2. *c.* 7. *s.* 6. *Lord Chancellor* doubtful at first, but on consideration thought it a lawful arrest, though on a *Sunday*.

HANCOCK and *Hooper*, the assignees of *Halliday*, a bankrupt, obtained an order for a Master to take an account of the dealings between *Whitchurch* and the bankrupt, *who reported 231 *l.* 5 *s.* 0 *d.* to be due from him to the bankrupt; and on arguing exceptions to that report, *Lord Chancellor* settled the sum at 226 *l.* only, which *Whitchurch* was ordered to pay to *Halliday*'s assignees.

[*56]

Whitchurch not paying the money pursuant to the order, on the 19th of *June* his Lordship granted the following warrant for apprehending him and carrying him to the *Fleet*.

" In the matter of *Edward Halliday*, a bankrupt,

" Whereas by an order dated the 28th day of *November*, " made in this matter upon the petition of *Jonathan Hancock* " and *Richard Hooper*, assignees of *Edward Halliday* the bank- " rupt, it was ordered, that *William Whitchurch should stand* " *committed* to the prison of the *Fleet*, for his contempt in the " said order mentioned, and that a warrant for such his com- " mitment should issue accordingly; these are therefore in pur- " suance of the said order to will and require you forthwith, " upon receipt hereof, to make diligent search after the body " of the said *William Whitchurch*, and wherever you shall find " him, to *arrest and apprehend him, and to carry him to the prison* " *of the Fleet*, there to remain till further order, *willing and re-* " *quiring all mayors, sheriffs, justices of the peace, constables, head-* " *boroughs, and all other his Majesty's officers, and loving subjects,* " *to be aiding and assisting to you in the due execution of the pre-* " *misses*, as they tender his Majesty's service, and will answer " the contrary hereof at their perils; and this shall be to you, " or any of you, that shall so do the same, a sufficient war- " rant. Dated this 16th day of *June* 1748."

HARDWICKE, C.

To *John Eyles*, Esq; Warden of the *Fleet*, or his deputy, attending the High Court of Chancery.

By virtue of this warrant *Whitchurch* was on *Sunday* the 9th of *October* last, between 4 and 5 in the afternoon arrested at *Froome* in *Somersetshire*, by *James Adlam*, his Lordship's tipstaff, by the order and direction, and in the presence of Mr. *Stephen Skurray*, solicitor for the assignees of *Halliday*, and by them detained at *Froome* till *Monday* morning, and then conveyed by *Adlam* to the *Fleet* prison, where he still is charged with that warrant only.

The petitioner insisted that being arrested on a *Sunday*, by virtue of a warrant founded on his Lordship's order, *for non-*

payment

Ex parte WHITCHURCH.

payment of money only, and not for *treason, felony, or breach of the peace*, it is contrary to the statute of the 29th of *Charles* the Second, *ch*. 17. intituled, An Act for the better observation of the Lord's day, commonly called *Sunday*, *sec*. 6. "Provided "also that no person or persons upon the Lord's day shall "serve or execute, or cause to be served and executed, any "writ, process, warrant, order, judgment, or decree, except "in cases of treason, felony, or breach of the peace, but that
[57] "the service of every such writ, process, warrant, order, judg- "ment, or decree, shall be void to all intents and purposes "whatsoever."

And therefore, the arrest being illegal, insisted that he was illegally detained in custody, and ought to be discharged.

Against the petition was read the affidavit of *James Adlam*, "who swore that on the 9th of *October* last, being *Sunday* in "the evening, *Whitchurch* came into the yard of the *George Inn* "in *Froome*, where *Adlam* was, and he thereupon told *Whit*- "*church* he had my Lord Chancellor's warrant against him; "*to which Whitchurch immediately answered, he knew it, and he* "*heard he was there, and came on purpose to be taken up*; and that "he several times after, both the same night and the next day "declared the same."

Adlam's affidavit was confirmed by two others to the same effect. "He likewise says he has often been told, and always "apprehended these warrants for contempts might be executed "on a *Sunday*, and he has himself done it several times, and "was never complained of before on that account." And it is agreed on all hands that a commission of rebellion may be executed on a *Sunday*, though it issued for want of an appearance, or an answer only, and it does not appear to the officer by the warrant for what the commitment issues, as may be seen by the copy of the warrant.

Mr. Attorney General against the petition cited 6 *Mod*. 95. *Carth*. 504. and the same case in *Salk*. *Parker* v. *Sir William Moore* 626.

Lord Chancellor: It appears from the affidavits, that there is not any occasion for the court to make any stretch in the petitioner's favour, and he was besides endeavouring to defraud the creditors of *Halliday* by absconding.

When this petition came on before, I was a good deal doubtful, and rather inclined to think it was a case within the statute of the 29th of *Charles* the Second; but upon looking into the matter since, I have in a good measure altered my mind, and think it a lawful arrest, though on a *Sunday*.

But I will observe first, as to the voluntary surrender of the petitioner to *Adlam* my tipstaff.

A man may surrender himself voluntarily to any warrant upon a *Sunday*.

The strength of the evidence goes to his voluntary surrender, for the fact is positively sworn to by three persons, and denied by *Whitchurch*'s affidavit only; and there can be no doubt but a man may, if he pleases, surrender himself voluntarily to my warrant on a *Sunday*.

The

The order of commitment which has been made in this cause, is very different from processes that issue to sheriffs, &c. for it is, *That the party should stand committed*, and is different too from most of the orders in other courts.

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The order of commitment here, *that the party should stand committed*, and if petitioner had been present when the order was pronounced, he was instantly a prisoner.

If this man had been present in court when the order was pronounced, he was instantly a prisoner, and the warden might have taken him away to gaol directly.

The books of practice, though I do not say they are of authority, yet all agree in laying it down that the party is considered as a prisoner from the time of the order pronounced. [58]

This is a warrant directed *to the very gaoler* to take him and carry him to prison, and differs from warrants of other courts, which are directed to sheriffs, and other ministerial officers, and not directed to the gaoler; and I do not know that this is done in any instance, but where the party is considered as the prisoner of the gaoler from the time of the order pronounced.

Escape-warrants are in aid of the gaoler, and command all officers, constables, &c. to assist him.

And this very warrant is drawn up in the same manner, and therefore alike in this respect, and escape-warrants may be put in execution on a *Sunday*.

In the case of Sir —— *Cecil*, and others of the town of *Nottingham*, Cases in King *William*'s time 348. "The question was, Whether serving an attachment upon a *Sunday* for "a contempt was within the statute against sabbath-breaking? "Said Lord Chief Justice *Holt*, suppose it were a warrant to "take for forgery, perjury, &c. shall they not be served on a "*Sunday?* And shall not any process at the King's suit be "served on *Sunday?* Surely the Lord's Day ought not to be a "sanctuary for malefactors, and this case partakes of the nature "of process upon an indictment."

Lord Chief Justice *Holt* of opinion a man might be taken upon a *Sunday* on a process of contempt, because in the nature of a breach of the peace, and an exception out of the act of parliament.

So that Lord Chief Justice *Holt* was inclined to think that a man might be taken upon a process of contempt on *Sunday*, because it was in the nature of a breach of the peace, and an exception out of the act of parliament.

7. If a man may be taken on an attachment for non-performance of an award upon a *Sunday* (1) as was held by the court of Common Pleas in a case cited by the Attorney General, why is not a contempt for non-performance of an order of this court, equally a breach of the peace, as the non-performance of an award.

Held that a man might be taken on a *Sunday* upon an attachment for non-performance of an award. A contempt for non-performance of an order of this court equally a breach of the peace.

8. Therefore, as it seems to be warranted by the words of the warrant itself, that he is a prisoner from the time of the order

(1) In *King* v. *Myers*, 1 *Durn. & East's Rep.* 266. the case here cited of an attachment for non-performance of an award upon a *Sunday*, was said to have been over-ruled by subsequent cases.

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Ex parte WHITCHURCH.

Lord Chancellor dismissed the petition as he is not without remedy, for he may bring an *habeas corpus*, or an action of false imprisonment.

pronounced, I will not discharge him, especially as he is not without remedy; for he may bring an *habeas corpus*, or an action of false imprisonment, and therefore order that the petition for his discharge be dismissed.

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[59]

CAP. XIII.

Assets.

Vide title *Heir and Ancestor*, and *Executors and Administrators*.

February the 4th, 1739.
Case 19.
S. C. Amb. 413.

A. gives several legacies, and makes *B.* his executor and residuary legatee. *B.* receives all the assets, and buys lands with the money, and dies, and also bought the equity of redemption of another estate on which *A.* had a mortgage. Bill brought by legatees, to be paid their legacies out of *A*'s real and personal estate. The court directed an inquiry, whether part of the assets were laid out in the purchase of an estate, and if they were, declared they ought to be restored to testator's personal estate. The equity of redemption held to be assets.

Ryall v. *Ryall*.

THE testator gave several legacies, and made *B.* his executor and residuary legatee. *B.* receives all the assets, and buys lands with the money, and dies, and likewise bought the equity of redemption of another estate on which testator had a mortgage. The bill was brought by the several legatees against the administrator and heir at law of *B.* to be paid their legacies out of his real and personal estate.

First question, If the personal assets are not sufficient, whether the legatees may not come upon the purchased estate for satisfaction?

Second question, Whether the equity of redemption of the mortgaged estate bought since the death of the testator, may not be considered still as the assets of the testator, and liable to answer the legacies?

For the plaintiffs was cited the case of *Bolney* v. *Hamilton*, before Lord *King*, *July* the 4th, 1729.

For the defendant, *Kirk* v. *Webb*, *Prec. in Ch.* 84. and *Kinder* v. *Milward*, 2 *Vern.* 440.

Lord Chancellor: Courts of equity have been very cautious how they follow money which has been laid out in land, because it has no ear-mark, though they have done it in some cases (1).

The principal difficulty in these cases is, with regard to the proof; for the different interests of the parties introduce a contrariety of evidence, and is no small temptation to perjury.

(1) *Vide Kirk* v. *Webb*, *Prec. Cha.* 84. 2 *Vern.* 440. S. C. 2 *Eq. Ab.* 744. *pl.* 4. *Heron* v. *Heron*. *ibid.* 163. 2 *Eq. Ab.* 744. S. C. *Halcot* v. *Markant*, *Prec. Cha.* 168. 2 *Eq. Ab* 744 *pl* 3. S. C. *Kinder* v. *Milward*, *Prec. Cha.* 172. S. C. *Deg* v. *Deg*, 2 *P. W.* 414. *Waite* v. *Whorwood*, *post.* 2 *vol.* 159. *Balgney* v. *Hamilton*, *Amb.* 414. *Lane* v. *Dighton*, *Amb.* 409.

But

But in the present case I think it is necessary there should be an inquiry, whether part of the assets of the testator have been laid out in the purchase of an estate? Because if it should plainly appear that they have been so laid out, they ought to be restored to the personal estate of the testator.

Ryall v. Ryall.

Supposing the executor had been living, and had by his answer owned that he had laid out part of the assets in such purchase, *it would have removed the objection of fraud, and perjury, by letting in parol proof; but the person now before the court is only the administrator of the executor, and though he does indeed admit that credit is given to the accounts of the executor, yet this is no evidence against the infant heir at law, but it is ground for an inquiry into this fact, and the means of coming at this by way of resulting trust is excepted out of the statute of frauds; if the estate is purchased in the name of one, and the money paid by another, it is a trust notwithstanding there is no declaration in writing by the nominal purchaser (1), and upon enquiry a little matter will do to make it a charge *pro tanto*.

Where an estate is purchased in the name of one, and the money paid by another, it is a trust notwithstanding there is no declaration in writing by the nominal purchaser.

[*60]

As to the second point with regard to the equity of redemption, I think it is very clear that it must be considered as assets, and liable to the legacies.

(1) *Loyd* v. *Spillet*, *post* 2 *vol.* 150.

C A P. XIV.

Award and Arbitrement.

(A) *Parties only affected by it.*
(B) *For what Causes set aside.*

(A) *Parties only affected by it.*

Thompson v. *Noel* et al'.

Easter term, 1738.

Case 20.

FOWLER, one of the defendants, enters into articles previous to his marriage, in consideration of 1100*l*. portion, to vest 1000*l*. in trustees within six months after his marriage, the interest thereof to be received by him and his wife, during their lives, and afterwards the 1000*l*. was to be equally divided between the issue of that marriage; and, as a farther security for the performance of this agreement, gives a warrant of attorney to the trustees to confess a judgment for that sum, which is soon afterwards entred up: *Fowler* after that enters into a partnership in the wine trade with one *Hamilton*, and being

A. by articles previous to his marriage agrees to vest 1000*l*. in trustees, the interest thereof to be received by *A*. and his wife, during their lives, and afterwards to be divided between their issue, and gives the trustees a warrant of attorney to confess a judgment for that sum which was entered up accordingly. *A.* enters into partnership with *B.* afterwards, and being indebted to the partnership estate in more than his interest in that estate, they submit the difference between them to arbitration, and part of the stock in trade is awarded to be lodged in the hands of a third person; any part to be delivered to either of the parties on making it appear, any bond or other debt due from the partnership had been paid by either, the quantity to be delivered in proportion to the money paid.

indebted

THOMPSON v. NOEL et al'.

indebted to the partnership estate in a larger sum of money than his interest in the partnership effects, or any other property he had, could satisfy, the two partners submit the difference between them to arbitration, and accordingly a parol award is made, that 40 pipes of wine, part of the stock in trade, should be lodged in the hands of a third person, one *Hayward*; but any part thereof to be delivered to either of the partners on producing any bond, &c. which had been entered into on account *of the partnership*, paid off by the party producing the same; the quantity of wine to be delivered to be in proportion to the money so paid off.

The trustees in the marriage articles bring a *scire facias* on the judgment confessed to them, and take a moiety of the deposit stock in execution as the property of *A*.

The 40 pipes of wine were accordingly deposited, with the consent of *Hamilton* and *Fowler*, in the hands of *Hayward*, afterwards a *scire fa.* is brought on the judgment so confessed to the trustees in the marriage articles, and a moiety of these 40 pipes taken in execution by a *fieri facias* as the property of *Fowler*.

Bill by the partnership creditors to set aside the execution, and to have a moiety of the stock so seized appropriated to payment of their debts, insisting it was specifically bound by the award, and the execution of it. The plaintiffs being no parties to the submission, nor privy at all to the transaction, nor under an obligation of abiding by the award, ought not to have the benefit of it, and therefore bill dismissed.

The bill is now brought by *Hamilton*, who is likewise a separate creditor of *Fowler*, and twelve other creditors on the account of the partnership, to set aside this execution, and to have the value of the moiety of the 40 pipes of wine appropriated to the payment of the debts of these creditors, supposing the pipes of wine specifically bound by the award, and the execution of it, by depositing them in the hands of *Hayward* according to the award.

Mr. *Fazakerley* for the plaintiff, taking it for granted the award with respect to the deposit of the wine was intended as a provision for the creditors on the partnership account, and, as a security for the payment of their debts, insisted that every award, when made, was considered, in point of law, as the very act of the parties submitting to the determination of the arbitrators, and as the agreement of the parties themselves; and it is upon that foot an action of debt lies against the party on the award, for when a submission is made a rule of court, an attachment lies for non-performance of the award, as a breach of his own agreement, which by rule of court he had engaged to perform; and that this case therefore must be considered in the same light, as if the parties themselves in the first instance had, without the intervention of any arbitrators, agreed to make a deposit of these pipes of wine for the purpose mentioned in the award; that in such case the creditors, tho' there might be no alteration in the property made thereby, would have an equitable lien on these wines specifically in satisfaction of their debts, and as such would prevail against any execution afterwards at the suit of any other person; that the judgment creditors here, *the trustees*, merely as such, had no interest in these wines, but that right must arise, if at all, from the *fieri facias*, which could not take place here, as there was a prior equitable lien upon them: That indeed

where

where goods are specifically bound in equity, and a purchaser without notice, *&c.* afterwards gains a legal right in them, having advanced his money at the time upon the credit of those very goods, as such purchaser has an equal equitable lien, and the law too on his side, his right will prevail; but it is otherwise where the creditor at the time his demand first accrued, relied only on the personal security, and general credit of his debtor; there any legal right which he obtains afterwards in any of the effects of his debtor, must be subject to every such trust or equitable lien, which they were liable to in the hands of the debtor himself, and such creditor can only stand in the place of his debtor; as in the case of bankruptcy, the assignees, tho' perhaps equally creditors with any others (who have before obtained an equitable lien on any of the bankrupt's effects specifically) and have the law on their side too, the property of the bankrupt's effects being vested in the assignees, yet they must only stand in the place of the bankrupt, and take his effects subject to all those equitable charges, which they were liable to in the hands of the bankrupt. *Vide Salk.* 449. *Taylor* v. *Wheeler*, and *Eq. Cas. Abr.* 320. *Burgh* v. *Francis*.

THOMPSON v. NOEL et al.

Mr. *Noel e contra* insisted that the creditors had no right to bring a bill to have this award carried into execution, not being parties to the submission, nor concerned therein, it being a matter altogether transacted between *Fowler* and *Hamilton* only; and therefore as the creditors would not at all be concluded by this award, but at liberty still to pursue their remedy as they thought proper, for the recovery of their debts, there was no reason why they should have any benefit from this award, because it happened to be in their favour; he relied likewise on the want of sufficient evidence on the part of the plaintiffs, to prove the acquiescence of *Fowler* in the award, or even his knowledge what the award was; and indeed the only evidence to that purpose was his applying to the arbitrators before the award was finally made, to let him have part of the same to carry on his trade with (which the arbitrators would not comply with), and his agreement afterwards with *Hamilton* to have the wines deposited in the hands of *Hayward*, but no evidence that he was present when the award was made, nor any other evidence that he was informed of the contents of it.

Lord Chancellor: A bill to carry an award into execution when there is no acquiescence in it by the parties to the submission, or agreement by them afterwards to have it executed, would certainly not lie (1); but the remedy to inforce a performance of the award must be taken at law: It has been said the evidence here of *Fowler's* agreement to the award after it was made, was not sufficient to found a decree on; but what he principally relied on was, that none of the plaintiffs, the creditors, were parties to the submission, nor did it appear that they were so much as privy at all to the transaction; and there-

A bill will not lie to carry an award into execution where the parties to the submission do not acquiesce in it, nor agree afterwards to have it executed, but must be inforced at law.

(1) See *Norton* v *Myjall*, 2 *Cha. Rep.* 304. 2 *Vern.* 24. S.C. *Bishop* v. *Webster*, 1 *Eq. Ab.* 51. 2 *Vern.* 444. S.C.

fore,

Thompson v. Noel et al'.

fore, as they were under no obligation of abiding by the award, they ought not to have the benefit of it; and in reading over the award (which, at the time of making it, was taken down in writing), he observed it was calculated only for the indemnity of *Hamilton* against the failure of *Fowler*, without any regard had at all to the creditors, there being no provision made, that the wines should be sold, or otherwise employed for raising money for the payment of debts of the plaintiffs: that though an agreement made between the two partners, and particular creditors, to appropriate a particular part of the partnership effects for the payment of those creditors, might create a lien on those goods specifically for the payment of their debts, in preference to the rest of the creditors; yet an agreement of that kind between the partners only, would certainly not disable any of the creditors from pursuing their remedy at law against the effects of the debtor, any more than if no such agreement had been made.

The bill dismissed.

(B) *For what Causes set aside.*

June the 18th, 1737. Upon Appeal from the Rolls.

June the 18th, 1737.

Mary Medcalfe Widow, and *William Ives*, *William Ives* and *Ann* his Wife by cross Bill, Plaintiffs.
Mary Medcalfe and *Richard Johnson* and Wife Defendants.

Case 21.

S. C. cited 7 *Viner*, 221. pl. 19. 2 Ves. 11.

A. and his wife covenant in articles before marriage, in consideration of 2000*l.* the wife's portion, to release all the right that might accrue to them out of her father's personal estate, by the custom of *London*.

THE bill in this case was brought to have a specifick performance of articles made on the marriage of the defendant *Richard Johnson*, whereby the said defendant and his wife (1) covenanted, in consideration of 2000*l.* the wife's marriage portion, to release all the right and interest that might accrue to them out of her father's personal estate, by the custom of the city of *London*, he being a freeman, and also to set aside an award alledged to have been unduly obtained upon a submission of the controversies between the parties, concerning the right to this orphanage part.

As to the first part of the case, the defence made for the defendant was, that the customary part being a mere possibility, and contingency, which might or might not happen, it could not be released, and if it could, that, at the time of the articles, the wife was an infant, and so not bound by them; besides that the 2000*l.* was no consideration for releasing such an interest, the wife's father, one *Russel*, having died worth upwards of 20,000*l.*

Lord Chancellor: Though hardships may happen on my determination, yet these are considerations too loose either for a judge at law, or in this court, to lay any weight upon; and

(1) The articles were dated the 4th day of *February* 1703, and the wife was then under age. *Reg. Lib.* B. 1736. *fol.* 445.

I must

I must determine according to the facts, by the rules of law, and of this court: in this case there appeared to be a valuable consideration for the agreement in the articles, because, at the time the 2000*l.* was given, the defendant's wife was intitled to no part of the estate of her father, and it was given for her advancement in the world, and it is highly reasonable that such kind of articles should be carried into execution, and that when a father is bountiful to his children in his life-time, that he should have his affairs settled to his own satisfaction. [64]

Ives v. Medcalfe.

As to the objection of the customary part being a possibility, and merely in contingency, it is of no weight, for there is no doubt but it might be released in equity (1); but here it is a covenant which the defendant is bound by in all events, and it is no objection to say, the wife was under age; for though in this respect, if the husband were dead, the articles would not bind her, and she would by survivorship be intitled to the customary share, as a chose in action not recovered, or received by the husband; yet he being alive, it is a matter that accrues to him in right of his wife, and he may release it, and his release will bind her; and therefore it was reasonable he should perform his covenant (2). I found my opinion too on an old law well known in the city by the name of *Jud's* law, whereby a husband was authorised to agree with the father for the wife, though she was under age (3).

The husband is bound by his covenant, and tho' the wife was under age, yet it is a matter that accrues to him in the right of his wife, and he may release it, and his release will bind her.

Upon this another question arose, whether the orphanage share, so to be released by the defendant, should fall into the dead man's part, and go wholly according to his disposition of the residue of his estate, as a thing purchased by him; or, whether it should fall into his personal estate, and be distributed with it according to the custom? And at first I inclined to think that it was in the nature of a purchase by the father, and so wholly in his power to make a disposition of it by his will; but, upon hearing the Attorney-general to this matter, I am of opinion, that as in equity things covenanted to be done, are as things actually done, it must be considered as if the husband had actually released, and so is an extinguishment of his wife's right to the orphanage part, and being an extinguishment of the right, it leaves the estate of the father as if it had never been charged with it, and must therefore be considered as a part of his general personal estate, and not to go wholly to the executor of the father, as a part of the dead man's share. Cases cited, 1 *Vern.* 6. 2 *Vern.* 665, 666, 1 *Will.* 644, 645. 2 *Will.* 527. (4).

The husband's covenanting to release, is an extinguishment of the wife's right to the orphanage part, and if so, leaves the estate of the father as if it had never been charged, and therefore must be considered as a part of his general personal estate, and not go wholly to the father's executor, as a part of the dead man's share.

(1) So *Blundel* v. *Barker*, 1 *P. W.* 639. 646. *Cox* v. *Belitha*, 2 *P. W.* 273. *Lockyer* v. *Savage*; 2 *Stra.* 947 *Secus* if a mere *voluntary* release. *Morris* v. *Burroughs*, *post.* 399.

(2) *Blundel* v. *Barker*, 1 *P. W.* 640. *Morris* v. *Burroughs*, *post.* 402.

(3) See *Hearn* v. *Barber*, *post.* 3 *vol.* 213.

(4) So *Pusey* v. *Desbouverie*, 3 *P. W.* 320. *Morris* v. *Burroughs* *post.* 403. *post.* 2 *vol.* 629. S. C. *Read* v. *Snell*, *post.* 2 *vol.* 644. *Hall* v. *Lumley* & other cases cited, in *Tomkyns* v. *Ladbroke*, 2 *Vef.* 592.

Ives v. Medcalfe. Where arbitrators are deceived, or where they make their award clandestinely, without hearing each party, a court of justice will interpose, and avoid such award (3).

As to the award, he decreed that it ought to be set aside, in respect that the articles were shewn only to one of the arbitrators, and not to both, and he to whom they were not shewn swore, that if he had seen them, he believed he should not have made such award: His Lordship held therefore, that it was unfairly obtained, but agreed to the general rules in cases of awards, that the arbitrators are judges of the parties own chusing (1), and that therefore they cannot object against the award as an unreasonable judgment, or as a judgment against law; but where, as in the present case, arbitrators are deceived, or where they make their award clandestinely, without hearing each party; in such cases a court of justice ought to interpose to frustrate and avoid such awards (2).

[65]

Though a bill in Chancery cannot be received in evidence at law, yet in this court it may be read, and has been often allowed as evidence.

In this case the plaintiff's bill was offered to be read as evidence for the defendant, and being objected against, it was said, *per Lord Chancellor*: at law, the rule of evidence is, that a bill in chancery ought not to be received in evidence, for it is taken to be the suggestions of counsel only; but in this court it has been often allowed, and the bill was read.

His Lordship reversed the order of dismission, and declared that by the articles of the 4th of *February* 1703, the defendant *Johnson* is to be considered in equity, as barred of any customary share in right of his wife, or otherwise, of the personal estate of the testator *William Russell* (4).

(1) *Tittenson* v. *Peat*, *post*. 3 vol. 529.

(2) *Vide Corneforth* v. *Geer*, 2 *Vern.* 705. *Ridout* v. *Pain*, *post*. 3 vol. 494. 1 *Vef.* 11. S. C. *Tittenson* v. *Peat*, *post* 3 vol. 529. *Anon. ibid.* 644. *Chilcot* v. *Lequesne*, 2 *Vef.* 315. *Knox* v. *Symmonds*, 3 *Bro. Cha. Rep.* 360. *Kampshire* v. *Young*, *post*. 2 vol. 155. note 1.

(3) It appearing that Mr. *Elleker*, the arbitrator, nominated on the part of the plaintiff and Mrs. *Metcalfe*, was not informed of the contents and effect of the said articles, and both bills now at hearing, praying to set aside the said award and *releases*, it was ordered and decreed, that the said award and *releases*, *executed in pursuance thereof*, be set aside. *Reg. Lib. B.* 1736. fol 447. See *Norgate* v. *Ponder*, *Nelf. Cha. Rep.* 6.

(4) *Reg. Lib. B.* 1736. fol. 447.

CAP. XV.

Bankrupt.

(A) *Concerning the Commission and Commissioners.*
(B) *Rule as to the Certificate.*
(C) *Rule as to Assignees.*
(D) *Joint and separate Commission.*
(E) *Rule as to his Executor, or where he is one himself.*
(F) *Rule as to Landlords.*
(G) *Rule as to Composition.*
(H) *Rule as to Creditors.*
(I) *Contingent Debts.*
(K) *Rule as to Drawers and Indorsers of Bills of Exchange.*
(L) *Where Assignees will be charged with Interest.*

(M) *Rule as to Partnership.*
(N) *Rule as to Costs.*
(O) *The Construction of the Repealing Clause in the Tenth of Queen Anne.*
(P) *Rule as to Dividends.*
(Q) *Commission superseded.*
(R) *Rule as to Bankrupt's Attendance on Assignees.*
(S) *Rule as to an Apprentice under a Commission of Bankruptcy.*
(T) *Rule as to discounting of Notes.*
(V) *Rule as to a Petitioning Creditor.*
(U) *Rule as to Notes where Interest is not expressed.*
(W) *The Construction of the Statute of the* 21 Jac. 1. c. 19. *with Respect to a Bankrupt's Possession of Goods after Assignment.*
(X) *Rule as to Copyholds under Commissions of Bankrupts.*
(Y) *Where Assignees are liable to the same Equity with the Bankrupt itself.* [66]
(Z) *What is or is not an Act of Bankruptcy.*
(Aa) *Rule as to Sales before Commissioners.*
(Bb) *Rule as to Examinations taken before Commissioners.*
(Cc) *Who are liable to Bankruptcy.*
(Dd) *Rule as to his Allowance.*
(Ee) *Rule as to Solicitors in Bankrupt Cases.*
(Ff) *Rule as to the Sale of Offices under Commissions of Bankruptcy.*
(Gg) *What shall or shall not be said to be a Bankrupt's Estate.*
(Hh) *Where there is a Trust for a Bankrupt's Wife.*
(Ii) *What is a Trading to make a Man a Bankrupt.*
(Kk) *Rule as to Acts of Parliament relating to Bankrupts.*
(Ll) *What is or is not an Election to abide under a Commission.*
(Mm) *Rule as to Prosecutions against him for Felony in not surrendering himself.*
(Nn) *Rule as to Contingent Creditors in respect to Dividends.*
(Oo) *Rule as to mutual Debts and Credits.*
(Pp) *Whether, during his Time of Privilege, he may be taken by his Bail.*
(Qq) *Rule as to a Certificate from Commissioners to a Judge.*
(Rr) *The Effect of Acquiescence under a Commission.*
(Sf) *Rule as to Debts carrying Interest under a Commission of Bankruptcy.*
(Tt) *Rule as to Principals and their Factors.*
(Vv) *Rule as to Annuities under Commissions of Bankruptcy.*
(Uu) *Rule as to taking out a second Commission.*
(Ww) *Rule as to an open Account under a Commission of Bankruptcy.*
(Xx) *Rule as to Principal and Surety.*
(Yy) *Rule as to the Insolvent Debtors' Act.*
(Zz) *Rule as to a Bankrupt's future Effects.*
(Aaa) *Rule as to a cessio bonorum.*
(Bbb) *Rule as to Deposits under a Commission of Bankruptcy.*
(Ccc) *Rule as to Relation under Commissions of Bankruptcy.*
(Ddd) *Rule as to an Extent of the Crown.*
(Eee) *Rule as to Creditors assenting or dissenting to a Certificate.*
(Fff) *Bankruptcy no Abatement.*
(Ggg) *Arrest upon a Sunday for a Contempt regular.*

(A) Concerning the Commission and Commissioners.

March the 13th, 1737.

Twiss v. *Massey*.

Case 22.

A commission of bankrupt is an action and execution in the first instance. Separate creditors may come under a joint commission, and prove their debts.

A Father and son join in trade, and have a commission of bankrupt awarded against them jointly; the bill was brought by a plaintiff, suggesting that he was a separate creditor for the sum demanded by the bill; the defendant pleaded his certificate, and that the debt accrued before he became bankrupt.

The question is, How far separate creditors are affected by, or can act under a joint commission of bankrupt? And Mr. *Brown* for the defendant cited, *ex parte Crowder*, 2 *Vern.* 706. where separate creditors were allowed to come in under a joint commission, but the joint effects are first to be applied to pay the partnership debts, and then the separate debts; and as to the separate effects, first the separate creditors, and afterwards the partnership creditors are to be paid out of the same; and therefore the plaintiff might have proved his debt under the commission.

Objection, That it was not affirmed in the plea, that the certificate was signed by four fifths in number and value.

Mr. Attorney General for the plea urged, that such a particular averment was not necessary in this court, though it might be so at law, for it is to be presumed here, till the contrary is proved, as the plea sets forth, that the certificate had been allowed by *Lord Chancellor*.

Lord Chancellor: As to the objection of its being a joint commission, that is no objection, for it affects joint and separate estates, because it is never taken out but where both are bankrupts; a commission of bankrupt is an action and execution in the first instance. Suppose an action against two partners, and judgment; separate estates are liable to satisfy that judgment; so in case of bankrupts, separate creditors may come in under that commission, as well as joint creditors (1).

If a bankrupt has a certificate under a joint commission, it discharges him from all debts, separate as well as joint.

As this court marshals demands and securities, so joint creditors, as they gave credit to the joint estate, have *first* their demand on the joint estate, and separate creditors as they gave credit to the separate estate, have *first* their demand on the separate estate; the joint commission therefore discharges them from *all their debts* expresly by the act of parliament, which does not mention joint or separate debts (2): but if the bankrupt has since the certificate made a new promise, that deserves a consideration, and intitles the plaintiff to a discovery; and therefore his Lordship ordered, that the plea stand for an answer (3).

(1) See *ex parte Sandon*, *post.* 68. *Ex parte Yale*, note A. *ibid.* *Wickes* v. *Strahan*, 2 *Stra.* 1157.
(2) So *Hessey's* case, 3 *P. W.* 24.
(3) *Reg. Lib. B.* 1737. fol. 188. *b.*

Ex parte Sandon. *March* the 29th, 1743.

Case 23. Commissioners have no power of admitting separate creditors to prove debts under a joint commission, without the sanction of the court.

A Petition on behalf of creditors upon the separate estate of two partners, against whom a joint commission is now depending, to be admitted to prove their separate debts under the joint commission. *Lord Chancellor* made an order accordingly, upon their bearing a proportion of the expence according to the value of the two estates: *commissioners, he said, have not a power of doing this without the sanction of the court* (1).

(1) See *ex parte Crowder, 2 Vern.* 706. *Ex parte Cook, 2 P. W.* 500. *Horsey's* case, 3 *P. W.* 24. *Gross* v. *Du Fresnoy, Davies* 373. *Twiss* v. *Massey, ante* 68. *Ex parte Baudier, post.* 98. In the matter of *Simpson, post.* 138.

Ex parte Simpson the Elder, *Thomas Simpson* and *John Simpson* the Younger: In the Matter of *Joseph Browning*, a Bankrupt. *August* the 1st, 1744.

Case 24. Commissioners upon the day for chusing assignees are not to examine critically into the debt, but to admit creditors for what they swear is due to them, as they are liable to an account afterwards.

*B*Rowning did in his own name contract with the commissioners of the navy, to furnish his majesty's ships with slop cloths, but the same was in trust for himself and the petitioners. On the 24th of *Nov.* 1742, articles of agreement were executed by him and the petitioners, whereby all the parties were to have an equal part in the contract, *and the accounts were to be settled, and signed every six months:* and in case any of the parties should die, or be rendered unable or incapable to carry it on, in his or their own right, then the share of such party dying, or becoming incapable, should be vested in the surviving and capable parties, and the executor of such dying or incapable parties, should on request make a legal assignment to the survivors or capable parties, and they should give bond for the value of his share at the time of the settlement of the last half yearly account, which was to be conclusive to the executors or administrators.

Browning being indebted on the contract, and also largely indebted to the petitioners on their private account, made an assignment dated the 21st of *January* 1742, of his interest in the contract, to the petitioners, in the *first* place to satisfy such sums as he then owed or any time after should owe to the petitioners on the contract or otherwise, and after such payment, to pay the overplus, if any, to *Browning*.

In *November* 1743, the contract standing in his name, the commissioners of the navy, for the safety of the public, directed that the petitioners should be made parties to the contract, and that it should be carried on in all their names; and the same was accordingly executed by the petitioners.

On the 6th of *Jan.* 1743, the last half yearly account touching the contract was settled, valued, balanced, and signed by *Browning* and the petitioners, when it appeared that the increase of stock arising from profits, from the commencement to

Ex parte SIMPSON.

to that day, amounted to 4642*l.* 3*s.* 4*d.* and that the bankrupt had received on account of the contract 28,526*l.* 16*s.* and had disbursed 28,146*l.* 10*s.* 5*d.* so that he then remained debtor 380*l.* 5*s.* 7*d.* to the contract.

On the 11th of *January* 1743, *Browning* settled and signed the petitioner's private account, when there appeared to be due on that account to the petitioners 4615*l.* 3*s.* 7*d.* and by the 24th of *April*, the day of his bankruptcy, there was due to them on the separate account 9480*l.* and upwards.

After *Browning*'s bankruptcy the Lords of the treasury were pleased to impress to the petitioners to enable them to proceed with the contract 20,000*l.* to prevent any distress to the seamen, which was to be repaid to the treasurer of the navy by defalcation out of their wages from time to time as the ships were paid off.

In *April* last a commission of bankrupt issued against *Browning*, and the petitioners attended at *Guildhall* and offered to prove their debt, but the commissioners refused to admit them, insisting the 20,000*l.* was to be accounted for as to one fourth part to the bankrupt; which the petitioners informed them could not be done, for if credit was to be given for it on one side of the account, it was a debt due to the treasurer of the navy on the other; so that it made no variation therein: however the commissioners thought proper to postpone the choice of assignees, *and therefore the application to the court is, that the petitioners may be admitted to prove a debt of* 9480l. *and that the commissioners may proceed to the choice of assignees.*

Lord Chancellor: The act of the 5th of the present king says, "The commissioners shall forthwith, after they have "declared the person against whom a commission shall issue "a bankrupt, appoint a time and place for the creditors to "meet, in order to chuse an assignee or assignees of the said "bankrupt's estate and effects."

The creditors present at such meeting are intitled to vote, unless some material objection against them, and the majority in value to determine the choice, which makes it a considerable question, whether creditors shall be admitted or not.

The application here is, that I will direct the commissioners to proceed to the choice of assignees: this is nothing more than what is their duty, and therefore superfluous.

The cross petition is, that I would postpone the demands of the petitioners, and direct the commissioners to chuse assignees, without admitting the petitioners to vote in such choice.

The petitioners by their affidavit swear to a balance.

But the great objection is, that this is not a complete account, and therefore the whole ought to be taken, before the petitioners are intitled to be admitted creditors under the commission.

Now as to this, the petitioners swear that on the partnership the bankrupt was only a debtor for 380*l.* 5*s.* 7*d.* Whether the account is strictly made up between them I cannot say, but I

rather believe not, for it is no more than rests, or like a computation between partners in the brewhouse trade.

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But then it is said, here is a sum of 20,000 *l.* paid by the government since the making up of this account, and that this ought to be brought into the calculation.

But I look upon it to be a loan only from the government, for it is stated in the memorial, that whatever sum shall be advanced by the government, the treasurer of the navy has it in his power to retain this again by way of defalcation: so that this is only in the nature of an impress on the part of the government, and therefore may be laid out of the case; and if so, here is a man ready to prove a debt a certain liquidated demand upon a stated account.

But say the petitioners in the cross petition, *There are other accounts not made up, and therefore they shall not be allowed to prove.*

Suppose a debt due on a bond, and an open account besides, the creditor finally is to be admitted a creditor only for the balance; and yet notwithstanding it is every day's experience that he is admitted to prove the bond debt, but still the commissioners may take the account afterwards, and the creditor shall be intitled on a dividend to no more than what appears to be really due to him on the balance.

A creditor by bond, and an open account likewise, shall be admitted to prove the bond, because the commissioners may still take the account, and upon a dividend he shall be intitled to no more than is due to him on balance.

As it would be extremely hard to exclude persons who may perhaps be the greatest creditors, till the account is determined, which may be the work of several years; and as it may be necessary and convenient that assignees should immediately be chosen, the commissioners therefore are not critically to examine into the debt, but to admit creditors upon their oath for what they swear is due to them, as they will still be liable to an account afterwards.

His Lordship therefore ordered that the commissioners should permit the petitioners to make proof of their debts, and that they should at present admit them creditors for what they should so prove, and that they should proceed to the choice of assignees.

Ex parte Simpson and others.

December the 22d, 1744.

Case 25.

IN pursuance of the order of the first of *August* 1744, the petitioners attended the commissioners on the 24th of *August* last at *Guildhall*, and a deposition was prepared for the petitioner *Thomas Simpson*, who offered to swear that the sum of 8000 *l.* and upwards was then actually due to him and his partners; but two of the commissioners refused to administer the oath, unless he would deliver up the assignment given by the bankrupt, dated *January* 21, 1742; whereupon the choice of assignees was again postponed by order of the commissioners.

A creditor in all cases of open accounts ought not to be excluded till the account is taken, because then the choice of assignees might arise from a minor part in value of the creditors; but still, if commissioners have just grounds to doubt the debt, they do right to admit it only as a claim.

And on the 5th of *December* instant at a meeting under the commission against *Browning*, for the creditors to prove their debts

Ex parte SIMPSON.

debts and chuse assignees, the petitioners attended and swore to a debt of 8000*l.* and upwards, due to them from the bankrupt upon balance of all accounts, and in their deposition waved the assignment, and all benefits thereof; but notwithstanding they had sworn to their debt, two of the commissioners refused to allow it, or to permit the petitioners to vote for assignees.

And therefore they now pray that they may be admitted creditors for their debt of 8000*l.* and upwards, and to vote in the choice of assignees of the estate and effects of the said bankrupt.

Lord Chancellor: The question is not now whether the petitioner is to be admitted a creditor at all events for 8000*l.* but whether he is to be admitted so as to join in voting in the choice of assignees; for there are distinctions in the act of parliament, and after voting in the choice of assignees his debt is equally liable to be disputed before the commissioners, or in this court, notwithstanding it has been so admitted.

And this plainly appears from the clause in the act relating to credit, "And be it further enacted by the authority aforesaid, that when it shall appear to the commissioners, or the major part of them, that there hath been mutual credit given by the bankrupt, or any other person, or mutual debts between the bankrupt and any other person, at any time before such person became bankrupt, the commissioners, or the major part of them, or the assignees of such bankrupt's estate shall state the account between them, and one debt may be set against another; and what shall appear to be due on either side, on the balance of such account, and on setting such debts against one another, and no more, shall be claimed or paid on either side respectively."

How does the matter rest then? There may be in the case of merchants, or as this is, in a matter of contract with the government, an open account, and if there does not appear to the commissioners any reasonable objection to the fairness of the debt, the petitioners ought to be admitted, for the assignees may afterwards settle the account, or it may be done in an adverse way.

If it was to be taken that in all cases of open accounts the creditor ought to be excluded till the account is taken, the choice of assignees might arise from a much *minor* part in value of the creditors, or the choice of assignees might be suspended for some years from the necessity of a previous suit in this court.

But notwithstanding this, if commissioners (tho' the creditor has made a positive oath) have just grounds to doubt the fairness of the debt, they do right to admit it only as a claim (1).

As to this particular case, I think the petitioners ought to be admitted to prove; the doubt arises upon the examination before the commissioners, and upon the affidavit of the bankrupt, and the great objection that there has been no account taken of the profits of the partnership between the petitioners

(1) *Ex parte Wood, post.* 222.

and

and the bankrupt, and it is ſworn poſitively by *Browning* that he has not been paid any thing on account of the profits, nor has it ever been ſettled between them.

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But I am of opinion this is not true; no ſtrict minute account has indeed been taken of profit and loſs; the ſlops that they ſend out are in the hands of agents, while fleets are abroad, and therefore no final account could be taken, and for this reaſon the articles provide, the account ſhall be taken half yearly, and that if either of the parties become bankrupt, his repreſentatives ſhall be intitled only to the profits of the laſt half year's account, and the riſque muſt be deducted as well as all other charges. This therefore does not remain as to the bankrupt an open account, for he is expreſsly by the articles to be bound by the laſt half year's account or a ſtated one.

If the petitioner was not to be admitted as a creditor it would be laying down a rule that every account, where there is mutual credit between bankrupt and creditor, muſt *firſt* be ſettled before he can be admitted to vote in the choice of aſſignees, and would be productive of very bad conſequences.

I do therefore order the commiſſioners to admit the petitioner's creditors for the ſum of 8000*l.* under the commiſſion againſt *Browning*, and that they be alſo allowed to vote in reſpect thereof in the choice of an aſſignee or aſſignees of the ſaid bankrupt's eſtate; but the ſame is to be without prejudice to any remedy that may hereafter be taken by the aſſignees who ſhall be choſen, or any of the bankrupt's creditors to controvert the petitioner's debt.

See 1 Cooke's Bank. Laws 318.

Ex parte Parſons.

January the 22d, 1746.

Caſe 26.

Poſt. 204. S. C.

The petitioner prayed that no commiſſion of bankruptcy might be ſealed againſt him till he had been heard by counſel againſt the iſſuing thereof.

THE petitioner ſtates by his petition that he never carried on the trade of a brewer, nor any other trade whatſoever, nor did he ever ſeek or get his livelihood by buying and ſelling of any wares, goods, or merchandizes whatſoever, as people in trade uſually do; and being adviſed he is not liable to all or any of the ſtatutes made and in force concerning bankrupts, by the deſcription of a brewer or any other whatſoever: therefore prayed that no commiſſion of bankruptcy might be ſealed againſt the petitioner, till he had an opportunity of being heard by his counſel againſt the iſſuing thereof.

Lord Chancellor ſaid he did not approve of caveats againſt commiſſions of bankruptcy from the general inconvenience, as they will give an opportunity to perſons againſt whom the commiſſion is to be taken out to make away with their effects.

Mr. *Parſons* the father, by his codicil to his will, directs Mrs. *Parſons* ſhall carry on the trade of the brewhouſe for the benefit of his ſon, till he arrives at his age of 21.

The ſon attained his age of 21 in *Auguſt* 1745.

Lord Chancellor: I ordered this attendance on the petition, becauſe I do not approve of caveats againſt commiſſions of bankrupt before they iſſue; there have been ſome few inſtances, but

Ex parte PARSONS.

but I hope this will be the last, because it will be a great inconvenience in general, as it will give an opportunity to persons, against whom the commission is to be taken out to make away their effects.

His Lordship ordered, that the commission of bankruptcy should issue against the petitioner, upon the petition of *William Belchier*, and that the commissioners should be at liberty to proceed so far as to decree the petitioner a bankrupt, and to make a provisional assignment of his estate and effects, to an assignee to be appointed by them under the said commission; but the commissioners are not to issue any warrant of seizure against the petitioner's effects, nor to summon him to surrender himself; and further ordered, that the parties proceed to a trial at law in the king's bench, upon the following issue: Whether the petitioner *John Parsons*, on or before the 19th of *January* instant, was a trader within the true intent and meaning of the statutes in force concerning bankrupts or any of them; in which issue *Belchier* is to be plaintiff, and the petitioner is to be defendant? When, after the trial shall be had, either of the parties are to be at liberty to resort back for further directions.

November the 4th, 1747.

Ex parte Thomas.

Case 27.

A note given before an act of bankruptcy tho' indorsed after, is a debt upon which the indorsee may take out a commission of bankruptcy against the drawer.

THE bankrupt petitioned to supersede the commission against him, because the petitioning creditor's debt arose only from a note that had been indorsed to him; after the petitioner had committed an act of bankruptcy; but as it appeared that the note itself was given before any act of bankruptcy, though indorsed after, *Lord Chancellor* thought it a debt upon which the petitioning creditors might take out the commission (1).

(1) Anon. 2 *Wils.* 135. *Bingley* v. *Maddison*, 1 *Cooke's B. Laws* 22. *See Ex parte Lee*, 1 *P. W.* 782.

(B) *Rule as to the Certificate of a Bankrupt.*

Vide the Case of Twiss *v.* Massey, *under the Division, concerning the Commission and Commissioners.*

January the 22d, 1741.

Ex parte Fydell.

Case 28.

The certificate of a bankrupt being stayed upon the petition of a claimant under the commission, who suggested fraud and collusion between the bankrupt and his son. At a meeting of the commissioners to examine into this matter, several new creditors came in and proved their debts; but as they did not join in a petition to set aside the certificate as fraudulently obtained, the court would not delay the allowance thereof, but left the claimant to bring a bill if he thought proper.

FOUR parts in five of the petitioner's creditors in *May* 1740 signed the bankrupt's certificate.

But *Anthony Dansie* and *Joseph Morson*, who had only claimed a debt of 4000 *l.* under the commission, petitioned some time

in *December* last against the Chancellor's allowing the certificate, upon suggestion that the bankrupt, by collusion with his son, had conveyed away an estate of 200 *l. per ann.* to the son without any consideration. Whereupon his Lordship on the 22d of *December* ordered, that it should be referred to the commissioners, to inquire into the conveyance made by the bankrupt to *Richard Fydell* his son, and the consideration thereof; and likewise as to the sum of 3863 *l.* mentioned in the affidavits of *Anthony Dansie* and *Joseph Morson*, and the disposition thereof; and the bankrupt's certificate for his discharge under the commission, was by the said order referred back to the said commissioners, who were to certify the whole to the court with all the circumstances relating thereto; afterwards the bankrupt and his son were severally examined before the commissioners concerning the matters in the order mentioned, and answered the same to the satisfaction of the commissioners, who by their certificate, dated the 15th day of *January* 1741, certified to the court, that they had reviewed the bankrupt's certificate, and that full four parts in five in number and value had signed the certificate.

Ex parte FYDELL.

The petitioner therefore prays that his certificate may be allowed and confirmed.

Mr. *Fydell*, the petitioner's son, being a member of parliament, the meeting was put off till the middle of *June*, and two days before, *Joseph Morson* died; but at the meeting several other persons came as creditors, who had not appeared till then, and proved debts of 20 *l.* and upwards.

Objected by the representative of *Morson*, that as he died but two days before the meeting appointed by *Lord Chancellor's* former order; there was no person who had any authority to appear before the commissioners in support of the claim of 4000 *l.* or to litigate the consideration of the bankrupt's conveyance to the son, and that none of *Joseph Morson's* relations had any personal notice of this meeting, and that as there are several new creditors, who have come in and proved their debts, the certificate already signed is void, as there are not now four parts in five in number and value who have signed.

Lord Chancellor. Upon looking into the statute of the 5th of the present king, I am of opinion, that every thing which is necessary to make it a good certificate has been done in this case; for the commissioners are in the first place to certify, that the bankrupt has in every thing conformed himself to the several directions required by the several acts of parliament relating to bankruptcy, and are further to certify, that four parts in five of the creditors in number and value, *who have duly proved their debts*, before them, under this commission, have signed; all which has been done in this case, in the usual form, so that there is no circumstance to distinguish it from the common cases.

If the new creditors who proved their debts at the last meeting had joined in a petition to set aside this certificate as fraudulently obtained, and made out their suggestions, it would have been a sufficient ground to set aside the former certificate; but as they have not done it, and have acquiesced under it, it would be a great

Ex parte FYDELL.

hardship upon the bankrupt, to delay him any longer, and therefore I must allow his certificate (1); but at the same time I will not preclude the representatives of *Joseph Morson* from making a further inquiry by bill, if they shall think proper, into the consideration of this conveyance of 200 *l. per ann.* to the son by the bankrupt his father, that if it should turn out to be a fraudulent conveyance, in order to secrete part of the father's effects for his benefit, the residue of the estate, after the mortgagees are satisfied, may be applied for the creditors at large.

(1) See *Ex parte Williamson, post.* 83. 2 *Vef.* 249. S. C.

November the 4th, 1743.

Bromley and others, Creditors of Sir *Stephen Evance*, Plaintiffs,
Goodere, surviving Assignee of Sir *Stephen Evance*, and others, ——— ——— } Defendants.

Case 29.

Where a bankrupt's estate is sufficient to pay all, with a large surplus, creditors whose debts carried interest, shall be allowed interest for their respective debts from the time the computation of it was stopped by the commissioners (1), but such as are creditors by bond, not beyond their penalties.

ON the 31st of *December* 1711, a commission of bankrupt issued against Sir *Stephen Evance* who was found a bankrupt, and his personal estate was assigned to Mr. *Goodere* and others, to whom his real estate was also conveyed; debts to the amount of 60,000 *l.* were proved under the commission, and on bonds and notes 4860 *l.* 13 *s.* 6 *d.* but interest was allowed by the commissioners only to the 31st of *December* 1711; the plaintiffs' testators paid 3 *d.* in the pound towards the charges of the commission: by four several dividends, all the creditors received 20 *s.* in the pound, and when the last was made, it appeared that Mr. *Gibson* one of the assignees had then in his hands 34,340 *l.* 9 *s.* 8 *d.* and in *Michaelmas* 1738, *Mary Ward*, as one of the next of kin of Sir *Stephen Evance*, brought a bill against Sir *Cæsar Child* the heir at law of Sir *Stephen*, and against Mr. *Gibson*, and Mr. *Goodere* for an account, and the cause in *November* 1739 was heard before his Honor, who declared *Mary Ward* and Sir *Cæsar Child* were intitled to an equal share of the surplus; Mr. *Gibson* and Mr. *Goodere* the assignees, have at different times obtained decrees in several causes, whereby Sir *Stephen Evance's* estate is encreased 30,000 *l.* and upwards, and is sufficient to pay all his debts with a large surplus; and in regard the plaintiffs' demands by law carry *interest*, and *no interest* has been allowed after failure of Sir *Stephen*, they pray by their bill, that the court will direct the money paid by way of contribution to be refunded, and give such directions as they shall think proper for the payment of the interest due to the plaintiffs on their bonds and notes, and that what remains now in the assignee's hands, may be retained for the plaintiffs' benefit.

(1) *Ex parte Morris*, 3 *Bro. Cha. Rep.* 79. S. P. where Lord *Thurlow* declared, that he would not have allowed interest, if it had broke in upon the bankrupt's allowance. See also *ex parte Champion*, 3 *Bro. Cha. Rep.* 436. *Ex parte Hankey*, *ibid.* 504.

In

In *February* 1711, Sir *Stephen Evance's* certificate was signed by the commissioners; in *March* following he died, and the 2d of *April* 1744, the certificate was confirmed by *Lord Chancellor Harcourt*.

The counsel for the defendant *Mary Ward* alledged, "that as "she was born after the death of Sir *Stephen Evance*, the plaintiffs [76] "ought to be put to the proof of the bonds entered into by him, "for as the testators and intestates of the plaintiffs who sought relief under the commission, made no other proof of their debts "than by their oaths, the plaintiffs shall now be obliged to make "strict legal proof.

"They insisted likewise, that as Sir *Stephen Evance* obtained "his certificate, and had been confirmed by the *Chancellor*, the "debts owing by the bankrupt antecedent were discharged, and "the plaintiffs are not intitled to interest on such debts, especially "as the certificate was signed by the testators and intestates of the "plaintiffs; but in case the court should allow interest to the specialty creditors, then they contended that the same shall not be "above the penalties of their securities."

Lord Chancellor: There are two demands in this case, one in behalf of all the creditors, to have the money paid by way of contribution, refunded out of the surplus of Sir *Stephen Evance's* estate; and the other, that the bond creditors, and all those whose debts carried interest, may be allowed interest for their respective debts, from the time the computation of it was stopped by the commissioners.

As to the first, It seems admitted by the defendants, that the contribution money ought to be refunded out of the surplus; the principal question therefore is as to the demand of interest, and I think that ought to be paid likewise.

It came before me originally upon petition, and even then my first apprehension was, that it would bear no great doubt, but as it was insisted, there was no just foundation for the demand, and that, if I determined it that way, my determination would have been subject to no appeal, I chose to have it come before me by way of bill.

But before I enter into the merits of the question, I will take notice of some objections that have been made, in order to lay them out of the case.

It has been objected, that this is not a proper question to come on by way of bill, *for the court can have no more power on a bill, than they would have had on a petition; and that therefore it ought to have been determined upon a petition.*

Where bills are brought to settle the demands of creditors in bankrupt cases, the rule of determination is the same, as if heard upon petition.

It is true the rule of determination must be the same, as if it had come before me by way of petition, but yet it is equally proper, that it should come by way of bill, and bills are frequently brought in cases of bankruptcy for settling the demands of creditors.

Another objection is, *That the defendants, the representatives of Sir* Stephen Evance *were not bound by the proof of the debts before the commissioners*; but I think they are bound, unless they can prove some particular objection to the debts.

The

BROMLEY v. GOODERE.

The proof of a debt before commissioners, unless an objection be made in a reasonable time, is conclusive, and the bankrupt's representatives are bound by it.

The common proof before the commissioners is the oath of the creditor, which is binding, unless the bankrupt, or the other creditors object to it, and then it is examined, and an appeal lies from the determination of the commissioners to the great seal by petition; but if no objection is made in a reasonable time, such proof by oath is conclusive.

A certificate allowed in the life-time of the bankrupt, though not confirmed by *Lord Chancellor* till after his death, is good, for the operative force of it arises from the consent of the creditors, and when confirmed, it has its effect from the beginning.

The next objection was made on the part of the plaintiffs to the certificate, *That not being confirmed till after Sir* Stephen Evance'*s death, it is void.*

Though Sir *Stephen Evance*'s certificate was not confirmed by Lord *Harcourt*, till two years after his death, yet I am of opinion it is as good and valid as if confirmed in the bankrupt's life-time; for notwithstanding the statute mentions only the bankrupt, yet it extends to his representatives.

On the death of the king, a commission may be renewed though the bankrupt be dead, (as it has been twice in this very case), and if a commission may be renewed against a bankrupt who is dead, it holds much stronger that a certificate may be allowed after his death (1); but then it is said, *the allowance is in nature of a condition, and the condition not being performed, the certificate is void.* The operative force of it arises from the consent of the creditors; the reason of allowance by the *Chancellor* is to prevent surprize, and is but a condition subsequent if you make it a condition, and when the certificate is confirmed, it has its effect from the beginning.

Having laid these things out of the case, I come now to the main question, Whether creditors for debts carrying interest by contract, are intitled to have subsequent interest? and I think they are.

All bankrupts are considered in some degree as offenders (2), they are called so in the old acts, and all the acts are made to prevent their defeating and delaying their creditors, and it would be an extraordinary thing, that the delay of payment should prevent the creditors from having interest out of an estate able to pay it, when interest in all cases is given for delay of payment.

I will consider this case *first* upon the old acts previous to the 4th and 5th of Queen *Ann*, and then upon that statute.

The statute of 13 Eliz. gives commissioners an equitable as well as a legal jurisdiction, and so construed ever since; and on petitions before the Chancellor, he proceeds as in causes by bill, upon the rules of equity.

The statute of *Henry* the 8th has been so much altered by subsequent acts, that it does not deserve any consideration, therefore laying that out of the case, I will begin with the 13 *Eliz. cap.* 7.

(1) See *Tudway* v. *Bourn*, 2 *Burr.* 716. *Troughton* v. *Gitters*, *Ambler.* 630.

(2) *Ex parte Capot*, *post.* 219. *Ex parte Lingood*, *ibid.* 242. *Ex parte Bennet*, *post.* 2 *vol.* 528. *Cooper* v. *Chitty*, 1 *Burr.* 31. *Tudway* v. *Burn*, 2 *Burr.* 717.

It is manifest this act intended to give the commissioners an equitable jurisdiction as well as a legal one, for they have full power and authority to take by their discretions such order and direction as they shall think fit; and that has been the construction ever since; and therefore when petitions have come before the Chancellor, he has always proceeded upon the same rules, as he would upon causes coming before him upon bill, *The rules of equity.* [78]

The next direction in the act is, what the commissioners should do in regard to the debts; they are directed *to pay to every of the creditors a portion rate-like according to the quantity of his or their debts.* And the question is, What debts are here meant? And I am of opinion it means debts due at the time of the bankruptcy, or when the commission issued, which is the same; for, to prevent disputes about the time when he becomes a bankrupt, the commissioners always find in general, that he was a bankrupt at the time the commission issued; but this construction must be confined to cases where there is a deficiency, for it is then only the creditors are to have a portion rate-like.

The act goes on to take notice of the surplus, which it directs to be paid to the bankrupt; and it leaves full power to the creditor to recover the residue of his debt, in like manner and form, as he should and might have done before the making of this act; and as before the act he must have brought his action for the penalty, therefore he must have done the same after the act, and at law he would have had judgment for the penalty; and if the debtor had come here for relief, he would not have had it upon any other footing than the payment of interest to that time.

This shews the surplus to be paid over to the bankrupt, is only the surplus after payment of the whole debts; for it would be vain to pay any other surplus, when it might have been recovered from him again by the creditors.

Thus it stands upon the 13th of *Eliz.* The next is the statute of the first of *Jac.* 1. *cap.* 15. that has not much in it, but the expression of *full satisfaction* in the clause which gives the bankrupt the surplus and is penn'd in these words: *That the commissioners shall make payment of the overplus of the lands,* &c. *and goods,* &c. *if any such shall be, to the bankrupt, his executors, administrators, and assigns, and that the bankrupt, after the* full satisfaction *of the creditors, shall have full power and authority to recover and receive the residue and remainder of the debts to him owing.*

But the more material act is the 21st of *Jac.* 1. *cap.* 19. in which there is the following clause: *That the commissioners may examine upon oath,* &c. *any person or persons for the finding out and discovery of the truth and certainty of the several debts due, and owing, to all such creditors, as shall seek relief under the commission, and that all and every creditor and creditors, having security for his or their several debts, by judgment, statute, recognizance, specialty with penalty or without penalty, or other security, or having no security, shall not be relieved upon any such judgment,* &c. *for any more than a rateable part of their just and due debts, with the other creditors of the bankrupt,*

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bankrupt, without respect to any such penalty or greater sum contained in any such judgment, &c.

This act only meant to exclude creditors from the benefit of the penalty as *against creditors*, and not as against *the bankrupt* himself.

[79] But then it is said, the practice has been for the commissioners to ascertain the debts, by computing interest only to the time of issuing the commission, and that being the *contemporanea expositio*, is to be relied on (1).

There is no direction in the act for that purpose, and it has been used only as the best method of settling the proportion among the creditors, that they might have a rate-like satisfaction, and is founded upon the equitable power given them by the act.

But still it has been said, that all creditors come under the terms of the commission, which is to have interest no farther than the time of issuing the commission; and if that was the rule of law, to be sure they must abide by it; but there is no such rule: it is said creditors have advantages given them by the act, and therefore they must abide by the disadvantages of it; but the advantages are very trifling, for by the 13th of *Eliz.* estates tail in possession and copyholds were given to the creditors, and it is only estates tail in remainder that are given by the 21st of *Jac.* the First, which is a very slight advantage, and for which it has no where directed that they should lose a subsequent interest, and the merely coming in to prove his debt cannot hinder him of it.

A certificate discharges the person of the bankrupt, and his estate subsequently accrued, but not the estate in the hands of the assignees.

I come now to consider it upon the 4th and 5th of *Ann*, *cap.* 17. which was insisted upon as the strength of the case; and the material parts to be considered are,

First, What are made the debts?

Secondly, What is the operation of the certificate?

Thirdly, The clause in regard to the allowance of 5 *per cent*?

As to the *first*, I do not find the words, *Debts due before the time of the bankruptcy*. Except in the clause of discharge, so that they seem to be left the same as in the former act.

Consider therefore the effect of the discharge, the certificate is not to operate as a discharge of the fund before vested in the assignees, but to extend only to any remedy to be taken against the person of the bankrupt, or his future effects. It is true it will be a discharge of the bankrupt not only as to debts proved, but also as to creditors who have not come in; but that is nothing as to the present fund, for such creditor who has not come in yet, may come in, if he has not lapsed his time, which is a question between the creditors singly; and therefore I am of opinion it was meant to discharge the person of the bankrupt, and his estate subsequently accrued, and not the estate in the hands of the assignees (2).

(1) See *ex parte Bennet*, *post.* 2 *vol.* 528. As to the difference between debts that carry interest, and a special *deposit of goods*, see *Bromely* v. *Child*, *post.* 259.

(2) See 1 *Cooke's B. Laws*, 222.

To come then to the clause which directs an allowance of five *per cent.* to the bankrupt, where the effects amount to ten shillings in the pound, &c. Bromley v. Goodere.

It is insisted, that the ten shillings in the pound is to be computed upon the debts stated by the commissioners, without regard to the subsequent interest; and so it is, because it proceeds upon a supposition of there being a defitiency of the creditors being paid a rateable proportion.

But suppose there is a surplus, and that it does not amount to 5 *per cent.* then I think so much should be taken out of the creditors twenty shillings in the pound as will make it up 5 *per cent.* [80] But then it may be objected, that here is a case where the bankrupt should have a surplus upon the debts as stated by the commissioners, without paying the subsequent interest; but if I am right in the bankrupt's being intitled to that equity, it is not the case, for then it comes again to the rateable proportion.

But it is said there is no detention in this case, and that interest arises from the detention of the debt; but the law presumes a delay in the bankrupt, and therefore it is due for that reason.

And suppose that from the difficulty of getting in the bankrupt's effects, and by his estate's carrying interest, there should be a surplus, it would be absurd to say the creditors should not have interest likewise.

But it is objected, there will be a difficulty in forming this decree, for, by this way, creditors upon simple contract may have a better satisfaction than creditors by specialty, for the specialty creditors cannot have more than their penalties, whereas creditors by notes carrying interest will have their whole interest; but no objection arises on that account, because it is a frequent case in the disposition of trust estates.

There is in this act a clause of mutual credit; suppose both debts carrying interest, and the creditor comes in late, certainly the commissioners ought to stop interest on both sides at the time of the bankruptcy, or compute interest on both sides till the settling the account; for it is absurd to say they should stop interest on the creditor's debt at the time of issuing the commission, and carry on interest on the bankrupt's demand.

Where there is mutual credit between a bankrupt and creditor, the commissioners ought to stop interest on both sides, at the time of the bankruptcy, or compute interest on both till the settling the account.

I mention this to shew that an equitable rule ought to be followed in giving interest in these cases.

Upon the whole therefore I declare, "That as there is a considerable residue of Sir *Stephen Evance*'s estate above what has "been divided upon the principal of the debts, and the interest of debts carrying interest down to the time of the commission, the contribution money paid by the creditors towards charges ought to be reimbursed out of his estate, and that all the creditors of Sir *Stephen Evance* by bonds, contracts, or notes carrying interest, are intitled to receive interest out of his estate for the principal sums, which were owing at the time the commission issued, from the day of its issuing till they receive full satisfaction, before any surplus shall be conveyed to the representatives of Sir *Stephen Evance.* Let the "Master

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"Master therefore take an account of the estate of Sir *Stephen* "*Evance*, in the hands of the assignees, and also of the distribution money, and compute interest on the principal sums "which were due at the time of the commission issuing on bonds, "contracts and notes carrying interest (1); *but upon the bonds* "*no interest beyond the penalties thereof* (2); and upon such other "contracts or notes carrying interest, the interest at the rate "therein specified, and wherein no particular interest is speci-

[81]

"fied, at the rate of 6 *per cent.* until reduced by act of parlia- "ment to 5 *per cent.* and from that time at the rate of 5 *per* "*cent.*

"I decree the effects of the bankrupt remaining in the hands "of the assignees, to be applied in the first place for the pay- "ment of the debts of such of the creditors who have not yet "proved to the satisfaction of the commissioners, though not "disallowed by them, and shall hereafter be allowed by the "Master, till paid up equal with the other creditors; and in "the next place to pay the contribution money, and then the "creditors by bond, contracts, or notes carrying interest, from "the time of issuing the commission, *pari passu*, till they receive "full satisfaction.

"The Master to take an account of what has been paid to "such creditors by way of dividends, and what has been so "paid to be applied in the first place to keep down the inter- "est, and afterwards in sinking the principal; and if the resi- "due of Sir *Stephen Evance*'s personal estate shall be sufficient "for the purposes aforesaid, then I decree that the remaining "real estate of Sir *Stephen Evance* be conveyed by the assignees "to Sir *Cæsar Child* (Sir *Stephen Evance*'s heir at law) and his "heirs, and if any surplus is left of the personal estate after the "purposes aforesaid, it is to be divided into moieties, and one "moiety to be transferred to Sir *Cæsar Child*, and the other to "*Mary Ward*; but if the personal estate be not sufficient, I "decree that a sufficient part of the real estate be sold, and the "money be applied for the purposes aforesaid, and the surplus "(if any) be paid to Sir *Cæsar*, and if any estate remain unsold, "that the same be conveyed to Sir *Cæsar*; if no surplus re- "main of the estate and effects of Sir *Stephen Evance* after debts "and costs, or if there shall be a surplus, which shall not be "equal to answer the allowances made to bankrupts, then I re- "serve the consideration in regard to such allowances till after "the master's reports. The costs to be paid out of the bank- "rupts estate (3)."

(1) *Secus* where interest is not expressed on the body of the note. *Ex parte Marlar, post.* 151.

(2) So *Tew* v. *The Earl of Winterton*, 3 *Bro. Cha. Rep.* 489. *Knight* v. *Maclean*, *ibid.* 496. *Vide Godfrey* v. *Watson, post.* 3 *vol.* 517.

(3) *Reg. Lib. A.* 1743. *fol.* 192. 195. *b.* This cause afterwards came on upon the Master's report, made in pursuance of this decree, and is to be found in *Reg. Lib. A.* 1744. *fol.* 573.

2

Ex parte Johnson and others.

January the 22d, 1745.

Case 30.

Where 4 parts in 5 in number and value of the creditors have signed the certificate, the court will not stay it on the petition of persons, whose demands on the bankrupt's estate depend upon an account to be taken, and where they do not swear to a balance in their favour. See now stat. 18 *G.* 3. *chap.* 52. *sect.* 76.

AN application to stay the bankrupt's certificate, on the petition of *Johnson* and others; four parts in five in number and value of the creditors had signed the certificate, and the demands of the petitioners were not liquidated, but depended upon a long account to be taken between the petitioners and the bankrupt; the bankrupt swears positively that the balance on taking the account will be in his favour; and the petitioners do not venture to swear that there will be any balance in their favour.

Lord Chancellor: I will not stay the bankrupt's certificate, but will give the petitioners leave to inspect his books, and in taking the account before the commissioners of their several demands, [82] if they shall hereafter appear to have a balance, they shall have a liberty to come upon the bankrupt's estate for that balance (1).

(1) See next case 83.

Ex parte Williamson, who prayed his certificate might be allowed, and a cross petition for creditors who opposed it.

March the 26th, 1750.

Case 31.

2 Vez. 249. pl. 10. S. C.

The bankrupt acts are not adopted in *Ireland*.

Where a person carries on a trade in one kingdom belonging to the crown of *Great Britain*, and comes over to another, a commission may be taken out by a creditor in the place where he then happens to be, as he has traded to this kingdom and contracted debts here.

Lord Chancellor

WHEN this matter came before me at a former hearing, I postponed the certificate, from the dislike I have to traders living in *Ireland* coming over here, and obtaining a commission (by way of collusion) against themselves, in order to get clear of all their creditors; and therefore I have given a greater latitude, and a length of time, more than usual, in order to allow an opportunity for *Irish* creditors, if there were any, to send over affidavits and proper authorities to prove debts under the commission; for as they have not (1) adopted the bankrupt acts in *Ireland*, I was willing they should have full time to apprize themselves of the nature of those acts, and send over proper affidavits of their debts. No application has been made to supersede the commission, and even if there had been one, it would have failed, because if a person carries on a trade in one kingdom belonging to the crown of *Great Britain*, and comes over to another, a commission may be taken out by a creditor in the place where the bankrupt then happens to be, as he has traded to this kingdom, and contracted debts here. There are several instances of this kind, where persons belonging to the plantations abroad, and which is their sole place of residence, yet happening to be in *England*, have had commissions of bankrupt taken out against them here (2.)

(1) They have now by stat. 11 & 12 *G.* 3. *c.* 8. of the *Irish* acts.

(2) *Bird* v. *Sedgwick*, 1 *Salk.* 110. *Dodsworth* v. *Anderson*, *Raym.* 375. *Alexander* v. *Vaughan*, *Cowper* 398. *Ex parte Smith in Canc. December* 25th, 1737. cited *ibid.* 402.

Ex parte WILLIAMSON.

I must be determined by the acts of parliament in allowing the certificate of a bankrupt.

Certificates are matters of judgment, and a *mandamus* would not lie to compel an allowance, for it is discretionary in the commissioners *first*, and in the *Lord Chancellor* afterwards.

Certificates are matters of judgment, and I do not know that a *mandamus* would lie to compel an allowance; for it is discretionary in commissioners *first*, and afterwards in the *Lord Chancellor*, and yet it ought not to be arbitrary, either in the commissioners or the *Chancellor* to say, We will, or will not, allow a certificate; but they ought to be governed intirely by fairness or fraudulent behaviour in the bankrupt.

Then one question will be, Whether *Williamson* has been guilty of fraudulent concealments to the prejudice of his creditors.

And another question, Whether the petitioners are persons qualified to be creditors under this commission, and to assent or dissent to the bankrupt's certificate.

Where a bankrupt is a trader in *Ireland*, signing his certificate in three months after the commission issues, is too precipitate; and *Lord Chancellor* stopped it on this account.

[*83]

My principal objection, when the matter of the certificate came first before me, was, the great haste that has appeared in *signing the certificate, in less than three months after the commission issued, which I thought too precipitate as he was a trader in *Ireland*, and might be presumed to have large debts standing out against him there; and it appeared also, upon the face of his examination, that the greatest part of his books were then in *Ireland*; so that he had not made such a full disclosure or discovery, as to intitle him to his certificate.

The objection to the unfairness of the account is now cleared up; for considering the largeness of the petitioning creditor's demand, being no less than 4900 *l.* it is much more accurately made up from the bankrupt's books, than is usual in bankruptcies; for very frequently the want of correctly keeping books, is the occasion of a person's bankruptcy; and it is a common saying in *Holland*, if a man fails, not that he is a bankrupt, but that *he kept his books ill.* If there had been creditors in *Ireland*, who had complained they had no opportunity of coming in, it would likewise have had weight, but there is no complaint of that sort, and from *August* 1749, to this time, no such creditor has appeared.

The last question is, Whether the present petitioners are qualified to object to and oppose the certificate of the bankrupt. Their first order to prove their debts was as long ago as the 2d of *August* 1749, and the certificate was stayed in the mean time, and also the dividend; not one of the petitioners but *Sharp* made an affidavit of a deb. at the time of the application, for the others had not verified their debts upon affidavit; and therefore, as they did not lay a foundation for it, I could not make an order, that they should go before the commissioners to prove their debts, but I purposely stayed the certificate to give them time to make out their debts in proof.

Sharp when he came before the commissioners only claimed, and although he called himself a judgment creditor, did not so much as produce a copy of the judgment on which he had the bankrupt in execution, and if he had, it would not have done, unless he had likewise

likewise by oath verified his debt; nor ought he to have been admitted a creditor even then, unless he would have discharged him from the execution, for he must not come under the commission, and prosecute the bankrupt at law likewise. *Ex parte* WILLIAMSON.

No other of the petitioners have so much as claimed before the commissioners, and unless a person proves, or shews a reasonable ground for a claim, they are not within the rule for assenting or dissenting (1).

Unless a person proves a debt, or shews a reasonable ground for a claim, he is not within the rule for assenting or dissenting to a certificate.

I cannot lock up certificates for ever, and deprive a man of his liberty, which the law has given him, after a full time has been allowed for iniquiry, and a full time also for creditors coming from *Ireland*, or sending affidavits over (2).

Nothing fraudulent comes out upon the inquiry, and no debt has been proved in a year and a half's time.

Therefore the certificate must be allowed, and ordered accordingly. [84]

N. B. It has been objected by the petitioner's counsel, that the allowing the certificate will preclude them from proceeding against the bankrupt's sureties, in the several securities now in their hands, and therefore there ought to be a saving to them of their right, notwithstanding the certificate is allowed.

The allowance of a bankrupt's certificate will not discharge his sureties, but they may be proceeded against, notwithstanding such allowance.

Lord Chancellor said, There was no occasion for such a restriction, for the allowing the certificate of the bankrupt will not discharge his sureties.

(1) *Ex parte Johnson, ante* 81. (2) See *Ex parte Fydel, ante* 72.

Anon.

December the 21st, 1753.

Case 32.

AN application by a person who is a creditor of a bankrupt, that he may be admitted to prove his debt before the commissioners, and to stay the bankrupt's certificate, and to be at liberty to assent or dissent thereto.

An application by a creditor to stay the bankrupt's certificate.

The commission was taken out but the 10th of *Sept.* last, and the certificate signed the 30th of *Nov.* following.

The commission was taken out the 10th of Sept. and the certificate signed the 30th of Nov. following.

Lord Chancellor: I disapprove extremely of commissioners being so precipitate in signing certificates.

This appears to me to be what is commonly called a clearing commission; for the assignees are very near relations of the bankrupt.

Such hasty proceedings invert the very intention of the acts of parliament, which were made in favour of creditors, but are too often abused for the service of insolvent persons.

This precipitate proceeding is contrary to the intention of the statutes of bankruptcy, which were made in favour of creditors, but too often abused.

His Lordship therefore directed the certificate to be stayed (1).

(1) See the preceding and the following case.

November the 2d, 1754.

Ex parte John de Sausmerez, Henry Brock, Matthew de Sausmerez: In the matter of William Dobree a bankrupt.

Case 33.

An application that the allowance of the certificate might be stayed.

ON the 6th of *April* last a commission of bankruptcy issued against *William Dobree*, who was declared a bankrupt.

The petitioners, and divers others of his creditors live in *Guernsey*, and from time to time, before he became a bankrupt, remitted to him several large sums of money, in order to be invested in the funds in *England*, in their names.

Since the issuing of the commission, the petitioners have discovered that *William Dobree* did not invest the money in the funds in their names, though he wrote them word from time to time [85] that he had so done, and remitted to them the interest as it became due.

The debts of the bankrupt amount to 81,009*l.* and the debts of the creditors who have signed his certificate, to 22,904*l.* 18*s.* 4*d.*

Peter Dobree, nephew of the bankrupt, proved debts under the commission, amounting to 13,688*l.* 10*s.* 10*d.* in different rights, part on his own account, part as executor of *Nicholas Dobree*, part as guardian of *Peter Dobree*, another part as guardian to *Rachel Carey Dobree*, another as guardian to *Mary Dobree*, another as one of the executors of *Martha Carey*, and another as father of *Judith Dobree*.

He chose himself and two other persons assignees, and on the 18th of *May* last, the very day the bankrupt finished his examination, the certificate is signed. *Peter Dobree* signed the certificate in right of other persons, four times, having proved debts in so many different rights, as guardian and executor to such persons.

There were but 12 of the creditors of *Wm. Dobree*, who proved their debts under the commission, besides *Peter Dobree*, and if he shall be considered but as one creditor, there will not be four parts in five in number and value of the creditors, who have proved their debts under the said commission, that have signed the certificate: the greatest part besides of the bankrupt's creditors could not possibly prove their debts at the time appointed for his last examination, by reason that they did not know whether the money they had remitted to the bankrupt had been laid out in stocks in their names, or in the bankrupt's.

In 1748, *Wm. Dobree*, the bankrupt, gave upon the marriage of his niece *Miss de Hairland* to his nephew *Thomas Dobree*, 1000*l.* as a marriage portion, at a time when he was insolvent.

The major part of the creditors who had signed the certificate were nearly related to the bankrupt.

For these reasons the petitioners pray that the allowance of the bankrupt's certificate may be stayed.

The second petition, *ex parte John de Sausmarez*, and several other creditors of *William Dobree*, states, that some short time before the commission issued, *Dobree* forgave two of his nephews 187*l.* which they owed him, and transferred divers stocks to the

the amount of 6000*l.* and upwards to ſeveral of his creditors, without their direction, in expectation of receiving favours of them in caſe a commiſſion iſſued; and prays the matter of this petition might come on to be heard at the time of the former petition, and that the bankrupt's certificate might be diſallowed.

Ex parte JOHN DE SAUSMAREZ.

The counſel for the petitioners inſiſted, that an executor and guardian cannot ſign a certificate.

Lord Chancellor as to this was of opinion, that executors might ſign, but that a perſon who has a debt in his own right, and another debt as executor, could not, as he apprehended, ſign a certificate in two diſtinct rights, for both are to be conſidered as his own particular debt.

A perſon who has a debt in his own right and another as executor, cannot ſign a certificate in two diſtinct capacities.

The counſel for the petitioner likewiſe obſerved, that till they had ſent over to *England*, they did not find out the fraud of the bankrupt in diſpoſing of their ſtock for his own benefit, and that the aſſignees never once thought proper to appoint any meeting, from the month of *May* till *Auguſt*, ſo that theſe creditors had no opportunity of proving their debts, which amount to 35,000*l.* and inſtead of four parts in five in number and value, there was not one fourth part had ſigned the certificate.

[86]

That by giving a fortune of 1000*l.* to his niece at a time he was inſolvent, he ſeems to be within the meaning of the clauſe of the 5 *Geo.* 2. where a bankrupt is excepted from the benefit of this act, "who hath or ſhall, for or upon marriage "of any of his children, have given, advanced or paid, above "the value of one hundred pounds, unleſs he ſhall prove, by "his books fairly kept, or otherwiſe upon his oath, before the "major part of the commiſſioners, that he had at the time "thereof, over and above the value ſo given, advanced or paid, "remaining in goods, wares, debts, ready money, or other "eſtate real and perſonal, ſufficient to pay and ſatisfy unto each "and every perſon, to whom he was any ways indebted, their "full and entire debts."

The clauſe in the 5th of *George* the 2d, in which a bankrupt is excepted from the benefit of this act, who hath upon marriage of any of his children given above the value of 100*l.* unleſs he hath ſufficient to ſatisfy all his creditors, muſt be conſtrued ſtrictly, and not extended further than children of a bankrupt.

Mr. Attorney-general for the bankrupt inſiſted, this is not within the intention of the act of parliament, and was going to give his reaſons, when *Lord Chancellor* interrupted him, by ſaying, it certainly was not; and as it was a penal clauſe, it ought to be conſtrued ſtrictly, and confined to the children of a bankrupt, and not to extend any further.

Mr. Attorney-general then obſerved upon other parts of the caſe, that though the debts are conſiderable, yet the deficiency will not be ſo, for there has been a dividend already of eleven ſhillings in the pound, and that there will be enough in the whole to pay three fourths of this large ſum of 81,000*l.*

That there is no objection to the reality of any creditor's debt who has ſigned the certificate.

That the greateſt part of the perſons in whoſe names the petition is preſented, have by attorney ſigned the bankrupt's certificate, and know nothing of this application; and particularly one *Burgeſs*, who, as appears by affidavit, is now upon a voyage to

Ex parte JOHN DE SAUSMEREZ.

to *Newfoundland*, and that upon application to his wife, for leave to make her husband a party to the petition, she positively refused to give her consent; so that the certificate has been stayed from *August* to this time, by false suggestions and allegations.

The certificate being signed upon the same day with the bankrupt's last examination, and two thirds of the creditors living in *Guernsey*, the allowance of the certificate stayed for these reasons.

Lord Chancellor: I shall not go upon any particular niceties in determining the question which has been made upon these petitions.

The bankrupt in general seems to have behaved very fairly, tho' at the same time I cannot acquit him in the matter of the stock, after receiving express directions from his correspondents at *Guernsey* to purchase the stock in their names, and yet taking upon him to buy it in his own, and then writing word that he had purchased it in their names; but be this as it will, I must not be induced to make a precedent, which, in my apprehension, will be a reproach to the justice of this court.

[87]

The most important of the bankrupt's transactions, and the largest of his debts are in *Guernsey*, which, though part of the dominions of the crown of *Great Britain*, are at a great distance from hence; and yet notwithstanding the commission is taken out in *April* only, the certificate is signed on the 18th of *May* after.

Such precipitation in a matter of this kind is very improper.

I will put the case that these creditors in *Guernsey* had heard of this bankruptcy, still they could not come in as creditors, till they had first directed a search in the books of the respective companies, to see in what manner the stock was purchased, whether in their own names, or the bankrupt's.

The creditors who have signed the certificate, and have proved debts to the amount of 22,000 *l.* are in number eleven, but then only seven of them have signed for themselves, and in their own right, for Mr. *Debree* the nephew has signed four times as guardian and executor, and the debts of the *Guernsey* creditors are 35,000 *l.*

The admitting such a certificate as this, would be turning the edge of the law against creditors in favour of bankrupts, which is not to be suffered in a commercial country.

Formerly the judges had the cognizance of certificates, but being found inconvenient, the Great Seal has taken it to itself.

All certificates formerly were referred to the judges; but the Great Seal finding this rather inconvenient, have of late taken the cognizance of it upon themselves, and they must exercise this power in a discreet and equitable manner.

Lord Chancellor stayed the allowance of the certificate.

(C) *Rule as to Assignees.*

December the 23d, 1737.

In the Matter of the Earl of *Litchfield* and Sir *John Williams*.

Case 34.

LORD *Litchfield* and Sir *John Williams* were assignees under a commission of bankrupt; the latter entrusted one *Gurdon*, the clerk of the commission, to receive some of the effects of the bankrupt's, and to pay some of the debts and dividends;

vidends; no fraud appeared in the assignees, but the clerk afterwards failing, the question upon petition was, If the assignees should make up the clerk's deficiency to the creditors?

Earl Litchfield. and Sir John Williams.

Lord Chancellor: The rules of equity in relation to necessary acts done by trustees, where trustees shall not be accountable for losses which happen from those necessary acts, hold not as to persons employed by the trustees, but only to the trustees themselves.

The rule that trustees shall not be accountable for losses which happen from necessary acts does not extend to their agents.

[88]

Where assignees under a commission of bankrupt, employ an agent to receive money, or pay, and he abuses this confidence; I will not lay it down as a general rule, but at present I am at a loss to distinguish such assignees from any other trustee, who, if his agent deceive him, *respondeat* superior to the *cestui que trusts*; so in the present case, as one of the assignees employed the clerk of the commission, a person of very little credit, to pay dividends, who misapplied and imbezzilled the money, this assignee will be liable to make it good to the creditors, as he did not consult the body of the creditors who are his *cestui que trusts* in the appointment of this agent; for, what is the chief consideration of creditors in the choice of assignees? Certainly the ability of the persons, that they may be responsible for the sums they may receive from the bankrupt's estate, by virtue of their assigneeship; but the negligence of one assignee shall not hurt another joint assignee, where he is not at all privy to any private and personal agreement entered into by his brother assignee; but this I cannot properly determine now: for all the court can do in a summary way under a commission of bankrupt, is in transactions only between the creditors and the assignees, but cannot upon petition adjust any demands that one assignee may set up against another, concerning a private agreement between themselves, independent of the rest of the creditors.

If an assignee under a commission of bankrupt, employs an agent to receive money, and he imbezzils it, the assignee will be liable to make it good to the creditors, unless he consulted the body of the creditors in the appointment of the agent.

All the Court can do in a summary way under a commission of bankrupt, is in transactions between the creditors and assignees, but will not on petition determine on private agreements between assignees independent of the creditors.

The money imbezzilled by the clerk of the commission was 1000 *l.* his bill of fees and disbursements delivered in by him before his death, was ordered to be taxed by the commissioners, and the residue to be applied towards satisfaction of the imbezzilment, and Sir *John Williams* the representative of the deceased assignee, to pay in 700 *l.* or whatever the sum may be, into the bank, to be added to the residue of *Gurdon*'s money after taxation, so as together they may be sufficient to make up the imbezzilment of *Gurdon*.

Anon. at the Rolls.

November the 30th, 1739.

Case 35. S. C. post. 571.

THE question before the court, Whether new assignees under a commission of bankrupt upon the death or removal of the former, shall, on filing a supplemental bill, be intitled to the benefit of the proceedings in a suit begun in the time of the first assignees, or must begin again by original bill.

Master

ANON.

Where assignees of a bankrupt die, or are discharged, and others are put in their room, they cannot revive, but must bring a supplemental bill, to intitle themselves to the benefit of proceedings in a former suit.

Master of the Rolls: In the case of abatements, if you can, you must revive; but in the case of assignees of bankrupts, where some die, or some are discharged, and others by order of court are put in their room, there is no privity between the bankrupt and the assignees, or at least but an artificial one, and *therefore they cannot revive; and it would be hard, if there have been pleadings, examinations, &c, in a former suit, that the new trustees should not have the benefit of them by a supplemental bill.

[*89]

Suppose the Court, upon the death or discharge of assignees of bankrupts, should say that they all must go for nothing, and you must begin again by original suit, why then all the charges and expences in the former suit are absolutely thrown away; but in the present method, though you cannot come against the representative of the former assignee, yet by a supplemental bill you will have the bankrupt's estate liable at all events to answer the costs.

A purchaser pendente lite, on filing a supplemental bill, is liable to all the costs from the beginning to the end of the suit.

I will put a case that comes very near this, and shews the reasonableness of my present determination. Suppose an estate has been in controversy for 20 years in this court, and during the suit it is purchased, the purchaser, on filing his supplemental bill comes into the court *pro bono & malo*, and shall be liable to all the costs in the proceedings, from the beginning to the end of the suit. *For these reasons his Honor was of opinion, that the new assignees shall have the benefit of the former proceedings, in the suit commenced by the old assignees* (1).

(1) *Vide anon. post.* 263. See also *Hewit* v. *Mantell*, 2 *Wils.* 373.

December the 14th, 1739.

Primrose v. *Bromley*, Executor of *Mead*.

Case 36.

S. C. 2 Vef. 102. cited.

Where an assignee dies before he has accounted for what he has received, and leaves no personal assets, the creditors have a lien upon his real estate.

THERE was a decree in another cause that all creditors, as well those who were parties to the bill, as otherwise, shall come before the Master to prove their debts against the estate of *Mead*; among the rest there appeared before the Master, *Moore*, the surviving assignee of one *Barker*, a bankrupt, and claimed as a debt such money as *Mead* had received as joint assignee with *Moore*, under the commission against *Barker*.

In the deed of assignment, *Moore*, *Mead*, and another assignee of *Barker*, covenanted *for themselves, their heirs, executors, and administrators, to account for such money as they or either of them shall receive, to the commissioners. Mead* before his death got in very large sums of money from the bankrupt's estate, and is dead insolvent.

The question before the Master was, Whether the commissioners under this assignment are to be considered as simple contract creditors only; and it came now before the court upon exceptions to this part of his report.

Lord Chancellor: I am of opinion that the commissioners ought to be considered as specialty creditors, because the assignees executed a counterpart of the assignment to them, and the

the agreement, being under hand and seal, makes it in the nature of a specialty debt; and, as they are considered in this light, though *Mead* is dead without any personal assets, yet they may come upon his real estate.

Primrose v. Bromley.

The words of the assignment, *to account for such money as they or either of them shall receive*, must be so construed, as that the as*signees may be jointly and severally bound, so that they are to be considered in this court as mere trustees, and each separately answerable only for what they receive, and it would be of dangerous consequence to hold them otherwise.

Assignees are mere trustees and each separately answerable only for what they receive.

[*90]

There was a case which I determined in this court, where there were two persons jointly bound in a bond, one of the obligors died; and to be sure, at law, it might have been put in suit against the survivor, but as I thought it extremely hard, I decreed the representative of the co-obligor should be charged *pari passu* with the surviving obligor in the payment of the bond (1).

Where a joint obligor dies, his representative shall be charged *pari passu* with the surviving obligor in the payment of the bond.

Though the form in the assignment under this commission of bankrupt is the common and usual one, yet I think it very proper that the words *jointly and severally* should be inserted for the future, for the safety and security of each respective assignee.

Proper to insert the words *jointly and severally* in assignments under commissions of bankrupts.

(1) *Simpson* v. *Vaughan*, *post.* 2 vol. 31. 33. *Bishop* v. *Church*, 2 *Ves.* 100. 371. In the latter case this point was fully discussed.

Ex parte Lane.

October the 22d, 1741.

Case 37.

WOOD, an alehouse-keeper in *Holborne*, became a bankrupt in the year 1729, and a commission being taken out against him at that time, *Fitchet* and *Kirk* were duly chosen assignees, one the landlord, and the other the brewer to the alehouse. In order to continue the trade, they put one *Wadelow* into the house, and allowed him to make use of the bankrupt's goods upon giving a bond for 100*l.* the value set upon them by the appraiser under the commission. *Wadelow* was made a responsible man till the year 1738, and then absconded.

Where assignees do not divide a bankrupt's effects in a proper time, but are making a private advantage to themselves, the court will charge them with interest.

Lord Chancellor: Where the effects of a bankrupt are so inconsiderable that no one creditor may think it worth while to call upon assignees for a dividend, yet if they neglect to make a dividend in a proper time, and are making a private advantage to themselves of the bankrupt's effects, I shall always charge such assignees with interest (1).

His Lordship ordered Kirk, *and the executrix of* Fitchet, *to account in moieties, for the value of the goods, according to the appraisement, and to pay interest for them at the rate of* 4 per cent. *to be computed from a twelvemonth after the execution of the assignment.*

(1) *Treves* v. *Townsend*, 1 *Cooke's B. Laws* 336. 1 *Bro. Cha. Rep.* 384 S.C.

April the 1st, 1742.

Ex parte *White*.

Case 38.

An assignee cannot stop a person's share in a dividend, on account of his own private debt owing to him from that person.

THE petitioner who had proved her debt under the commission, petitions against the assignees to be paid her share of a dividend that had been made of the bankrupt's estate.

[*91]

*One of the assignees insisted that he had a right to stop her share of the dividend, because she is indebted to him for a quantity of coals delivered to a third person, which the petitioner promised to pay.

Lord Chancellor: I will not allow an assignee who is an officer of this court, and an officer of the commission, to stop a person's share in the dividend on account of his own private debt, which is owing to him from that person; he has his remedy at law, and ought not to blend his own private affairs with the commission to which he is only a trustee (1).

(1) But see *ex parte Nockold*, 1 *Cooke's B. Laws* 442.

August the 13th, 1742.

Ex parte Whitchurch.

Case 39.

Post. 210.

Creditors cannot give a general power to assignees to prosecute suits, or submit matters to arbitration, at their own discretion, but there must be a meeting of creditors, upon a notice given in the London Gazette to consider of each particular suit, or case for arbitration.

WHERE only four creditors were present at a meeting, to consider whether they should carry on a suit against a debtor to the bankrupt's estate, they gave the assignees a general power, by a writing signed for that purpose, to prosecute such suits as they in their discretion should think fit.

Lord Chancellor: There is no colour to say that creditors under a commission of bankrupt, can give such a general authority, by virtue of the clause under the act of parliament of the 5th of *George* the Second; but assignees must have a meeting of creditors, upon notice given for that purpose in the *London Gazette*, to consider of each particular suit, or each particular case for arbitration, before they can proceed in them; and therefore I declare that the power here given by the creditors to the assignees, is not such a one as is warranted by act of parliament, and do order that the assignees be restrained from bringing any suit for the future, till they have a proper authority from the majority of the creditors at a meeting according to the statute.

Commissioners may order a dividend to be advertised, if they think it proper for assignees to make one.

The assignees in this commission having refused to make a dividend, his Lordship ordered, they should attend the commissioners at a sitting appointed for that purpose, and that if the commissioners thought it proper for the assignees to make a dividend, that it should be advertised accordingly.

August the 1st, 1744.

Ex parte Greignier.

Case 40.

The court will not set aside the choice of assignees, because some of creditors live beyond sea, and had no opportunity of voting.

THE application to the court was for new assignees, upon a suggestion in the petition that the time was too short, which the commissioners had appointed for the choice of assignees,

signees, the person having been found a bankrupt only on the 21st of *May*, and the sitting for the choice of assignees was on the first of *June*; that the debts proved at the time of the choice amounted only to 2075 *l.* and the petitioners living abroad could not, in so short a time, send over letters of attorney to vote in the choice, though their demands upon the bankrupt's estate will not be less than 11,000 *l.* that the assignee already chosen is a hatter, and not to be supposed conversant in foreign affairs, in which the bankrupt's concerns chiefly lie. *Ex parte* GREIGNIER. [92]

For the petitioner, the case *ex parte Anderson*, 1724, was cited, which was heard by Lord *Macclesfield* upon petition, who ordered a new choice of assignees, on a suggestion that a great number of creditors could not possibly be present at the first choice.

Lord Chancellor: The words of the act of the 5th of *George* the Second are, "The commissioners shall forthwith, after "they have declared the person, against whom the commission "shall issue, a bankrupt, cause notice thereof to be given in the "*London Gazette*, and shall appoint a time and place for the "creditors to meet, in order to chuse an assignee or assignees of "the bankrupt's estate and effects."

So that they are immediately to appoint a time and place for the choice of assignees, because it may be necessary to take care of the bankrupt's estate and effects; and I must not lay it down as a rule, that, because some of the creditors are abroad, and beyond sea, therefore I must at all events give them an opportunity of voting in the choice, and direct the creditors to proceed to a new choice.

If this was to prevail, the choice must be postponed to a great length of time which would be directly contrary to the act of parliament; and therefore the true rule is, that the assignees ought to be continued, unless the petitioners can shew there is some objection with regard to the substance or integrity of the person who is chosen assignee; but to do what is prayed by the petition, would be adding to the expence, by making two choices of assignees instead of one.

Assignees ought not to be removed, unless it is shewn that they are not persons of substance or integrity.

I desired that precedents might be searched to see if they could find any case where it had been ordered that creditors should proceed to a second choice, upon a suggestion, merely, that some of them live remote from *London*, or are out of *England*; but no such case is to be found, and besides it would be a dangerous rule, and therefore I am of opinion that the petition must be dismissed, and the assignee continued who is already chosen.

No precedent to be found of an order for creditors to proceed to a second choice, upon a bare suggestion that some live remote from London, or are out of England

Ex parte Kerney.

December the 22d, 1744.

Vide title *Arrest.*

November the 6th, 1745.

Walker and others *verſ.* Burrows.

Caſe 41.

B. in 1718 after marriage conveys his real eſtate to truſtees, in conſideration of five ſhillings and other valuable conſiderations, in truſt for himſelf for life, to his wife for life, then to his eldeſt ſon if he ſurvived his father and mother, and ſo to the next ſon, &c. *B.* afterwards became bankrupt. This is a conveyance which falls directly within the clauſe of the firſt of James the Firſt, cap. 15. and therefore truſtees decreed to convey to the plaintiffs the aſſignees under the commiſſion againſt *B.*

THE plaintiff's aſſignees were under a commiſſion of bankruptcy againſt the father of the defendant, who in 1739 conveyed all his ſhop goods, *&c.* by bill of ſale to the defendant his ſon, and in 1740 becomes a bankrupt. In the year 1718 he, after marriage, conveyed to truſtees his real eſtate, in conſideration of five ſhillings, and other valuable conſiderations, in truſt for himſelf for life, to his wife for life, then to his eldeſt ſon if he ſurvived his father and mother, and ſo to the next ſon, *&c.*

The bill brought to ſet aſide the bill of ſale as fraudulent, and that the deed of 1718 might be either ſet aſide as void, or truſtees decreed to convey to aſſignees under the commiſſion againſt *Burrows* the father.

The counſel for the plaintiff inſiſted, that the deed of 1718 was void as againſt creditors, being voluntary, and after marriage, by virtue of the ſtatute of the 13th of *Eliz.* or if not under that ſtatute, yet void under the 21ſt of *James* the Firſt, *ch.* 15. relating to bankrupts.

Lord Chancellor: As to the firſt part of the caſe, there is not a foundation to ſet aſide the aſſignment of houſhold goods, becauſe it was many months before the bankruptcy, and the conſideration of the aſſignment proved, and alſo followed by the poſſeſſion of the ſon.

With reſpect to the ſettlement by leaſe and releaſe in 1718, made after marriage in conſideration of five ſhillings, and other valuable conſiderations, there are two points;

Firſt, A general point, which it is inſiſted ariſes upon the conſtruction of the ſtatute of the 13th of *Eliz. cap.* 5. againſt fraudulent deeds.

Secondly, Upon the clauſe in the ſtatute of the 21ſt of *James* 1:

As to the firſt, That ſtatute is not ſufficient to prevail againſt the ſettlement.

It has been ſaid all voluntary ſettlements are void againſt creditors, equally the ſame as they are againſt ſubſequent purchaſers, under the ſtatute of the 27th of *Eliz. cap.* 4.

Neceſſary to prove on the ſtatute of the 13th of Eliz. that at the making of the ſettlement the perſon conveying was indebted at the time of the execution of the deed.

But this will not hold, for there is always a diſtinction upon the two ſtatutes: 'tis neceſſary on the 13th of *Eliz.* to prove at the making of the ſettlement the perſon conveying was indebted at the time, or immediately after the execution of the deed, or otherwiſe it would be attended with bad conſequences, becauſe the ſtatute extends to goods and chattels, and ſuch conſtruction would defeat every proviſion for children and families, though the father was not indebted at the time (1).

Recital of the act: "For the avoiding and aboliſhing of "feigned, covinous, and fraudulent teſtaments, gifts, grants, "alienations, conveyances, bonds, ſuits, judgments, and exe-

(1) See *ante Ruſſell* v. *Hammond,* 15.

"cutions,

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"cutions, as well of lands and tenements as of goods and "chattels, which feoffments, &c. have been and are devifed, "&c. *to the end, purpofe and intent* to delay, hinder, or defraud "creditors and others of their juft and lawful actions, fuits, "debts, &c. And it is enacted, that all and every feoff-"ment, gift, grant, alienation, bargain, and conveyance of "lands, &c. which are made for any *intent or purpofe* before de-"clared and expreffed, fhall be deemed and taken to be clearly "and utterly void, fruftrate, and of none effect."

Upon this ftatute, there is no other defcription of the intent of the conveyance, in the *enacting claufe*, but by reference only to the *preamble, the intent before declared and expreffed*.

So that unlefs the conveyance in 1718 was made for that purpofe, it will not be void: now here is no proof *Burrows* the father was indebted at the time or foon after, fo as to collect from thence the intention to be fraudulent, in order to defeat creditors; for, as Mr. Attorney General faid, if he had been indebted at that time, it would have run on fo as to take in all fubfequent creditors.

Where a man has died indebted, who in his life-time made a voluntary fettlement, upon application to this court to make it fubject to his debts as real affets, the court have always denied it, unlefs you fhew he was indebted at the time the conveyance was executed.

But upon the ftatute of the 27th of *Eliz.* which relates to purchafers, there indeed a fettlement is clearly void if voluntary, that is not for a valuable confideration, and the fubfequent purchafers fhall prevail to fet afide fuch fettlement; but this can only be applied to the cafe of fubfequent purchafers, and therefore a plain diftinction between the two ftatutes (1).

Upon the ftatute of the 27th of Eliz. fubfequent purchafers fhall prevail to fet afide a fettlement that is voluntary and not for a valuable confideration.

The affignees under the commiffion ftand only in the place of the bankrupt, and are bound by all acts fairly done by him, notwithftanding they gain the legal eftate; and this proves that affignees of bankrupts are not confidered as purchafers of the legal eftate for a valuable confideration for every purpofe.

Affignees ftand in the place of a bankrupt, and are bound by all acts fairly done by him.

It has been faid, I muft at this time take the deed in 1718 to be for a valuable confideration, becaufe expreffed to be for five fhillings, and other valuable confiderations.

But the confideration of five fhillings, and other valuable confiderations, does not oblige the court to hold it, at all events, to be for a valuable confideration, and can at moft only let the defendant into proof that there were other valuable confiderations.

The confideration in a deed of 5s. and other valuable confiderations, does not oblige the court to hold it to be for a valuable confideration.

And therefore as to this part of the cafe the truftees under the deed muft convey to the affignees under the commiffion,

(1) So *Colville* v. *Parker*, *Cro. Jac.* 158. *Ruffell* v. *Hammond*, *ante* 15. *White* v. *Sanfom*, fol. 3 vol. 412. Lord *Townfhend* v. *Wyndham*, 2 *Vef.* 10, 11. *Evelyn* v. *Templar*, 2 *Bro. Cha. Rep.* 148. *Vide Oxley* v. *Lee*, *poft.* 625.

for

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for it falls directly within the clause of the first of *James* the 1st, *cap.* 15. (1).

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"That if any person, which hereafter is or shall be a bank-" rupt, shall convey or procure, or cause to be conveyed to any "of his children, or other person or persons, any manors, "lands, &c. or transfer his debts into other mens' names, ex-"cept the same shall be purchased, conveyed, or transferred for "or upon marriage of any of his children, both the parties mar-"ried being of the years of consent, or some valuable consider-"ation, it shall be in the power and authority of the commis-"sioners, to bargain, sell, grant, convey, demise, or otherwise "to dispose thereof, in as ample manner, as if the said bankrupt "had been actually seised or possessed thereof."

His Lordship directed the trustees of the deed of 1718 to convey to the assignees, under the commission against *Burrows*, the father of the defendant.

(2) See *Fyer* v. *Flood*, 1 *Bro. Cha. Rep.* 160.

July the 3d, 1746.

Drury v. *Man*, surviving Assignee of *Johnson*, a Bankrupt.

Case 42.

An assignee under a commission of bankruptcy, must surrender a copyhold to a purchaser, notwithstanding the lord may exact two fines, for no person can make a common law conveyance of a copyhold.

JOhnson being possessed of a *copyhold* estate, in *Nov.* 1736, had a commission of bankruptcy taken out against him, and the commissioners by bargain and sale convey the copyhold to the defendant and another, as assignees under the commission, and their heirs who entered and received the profits.

The plaintiff entered into an agreement in writing, for the purchase of the copyhold, with an agent of the defendant, who, on behalf of *Man*, agrees that he, as assignee, shall, within two months, by bargain and sale, convey and assure to the plaintiff and his heirs the copyhold estate, and make a good title thereto as the plaintiff's counsel should advise; the plaintiff paid one shilling in earnest, and agreed to pay, upon the conveyance being made, 449*l.* 19*s.* more.

Disputes arising between the plaintiff and defendant relating to the manner, and by what deeds the copyhold estate should be conveyed to the plaintiff by defendant; it was agreed that a case should be stated, and laid before counsel for an opinion, what sort of conveyance defendant ought lawfully and with safety to a purchaser to make; the counsel was of opinion, that the defendant ought to be admitted tenant of the copyhold, and afterwards to surrender the same to the plaintiff, upon which surrender the plaintiff was to be admitted, and that a conveyance by indenture of bargain and sale, as proposed by the defendant, would not be proper, or a fit conveyance for plaintiff to rest upon.

The bill therefore is brought for carrying the agreement into execution, and that the defendant may be compelled to convey, or procure the copyhold premisses to be surrendered to the plaintiff.

The defendant insists that a surrender is not necessary, for that he had stated a case as to the method of conveying the copyhold estates to the Attorney General, who was of opinion, that there is no occasion for the assignee first to be admitted, and then to surrender to the vendee, and submits to convey to the use of plaintiff and his heirs by bargain and sale, but hopes he shall not be compelled to be admitted and then to surrender to plaintiff, as it would be a great expence, and insists plaintiff will be safe under such conveyance.

DRURY v. MAN.

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Lord Chancellor: I am of opinion that the assignee under the commission must surrender the copyhold to the plaintiff, though it is very hard the lord should exact two fines, but no person can make a common law conveyance of a copyhold; it must be by surrender; the commissioners by the 13th *Eliz. cap.* 7. have no interest in bankrupt's lands, but only a power to convey, and at first commissioners made sale to the creditors, but that was found inconvenient; therefore they made general assignments to trustees to distribute the whole.

The question is, Whether the general assignee is a vendee within the act of parliament of the 13th *Eliz.* and I am of opinion he is: What would be the consequence if he was not so? Why, the assignee might continue in possession for years before he makes a sale, and yet, by an express provision in the act, he is restrained from receiving the profits, till he has compounded with the lord: if the purchaser under the assignee was considered as the vendee within the statute, the assignee of a debt, who takes from the commissioners, could not sue for the debt; therefore the assignee only can be considered as the vendee.

An assignee under a commission of bankruptcy of a copyhold estate, is a vendee within the 13 *Eliz. cap.* 7. and not the purchaser from the assignee of such estate.

Decreed, the defendant to surrender the copyhold estate to the plaintiff (1).

Lord Chancellor recommended it to commissioners of bankrupts for the future, to except copyholds out of the deed of assignment of the bankrupt's estate, because it would save the expence of two fines; for the commissioners, where the creditors could meet with a purchaser of the copyhold, might convey to him in the first instance; and though there may be occasion sometimes for temporary assignments for the better preserving the bankrupt's estate, yet commissioners are not obliged by the clause in the 5th of the present king, relating to temporary assignments, to appoint an assignee of the whole estate, because the words are in the disjunctive, *immediately to appoint one or more assignee or assignees of the estate or effects, or any part thereof.*

Commissioners ought to except copyholds out of a deed of assignment of the bankrupt's estate, because it will save the expence of two fines to the lord, as they may convey to the purchaser thereof in the first instance by bargain and sale.

And besides, by leaving out the copyhold estate of a bankrupt in a temporary assignment, the creditors will run no risque

No prejudice will accrue to creditors by leaving out copyhold estates in a temporary assignment, for an extent of the crown will not affect it.

(1) And the costs and charges in procuring the defendant's admission in order to make such surrender, to be borne by the defendant; but the costs and charges of the surrender to be made by the defendant to the plaintiff, and of the plaintiff's admission to be borne by the plaintiff. *Reg. Lib. A.* 1745. *fol.* 253.

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with regard to the crown, for an extent will not effect it; so that in all respects it will be advisable to omit them in subsequent assignments.

Several things in the bankrupt laws which want reformation.

He said there were several things in the bankrupt laws, which wanted reformation, and whenever the legislature is applied to, it would be very proper they should remedy this inconvenience with regard to copyhold estates likewise.

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Grey v. *Kentish.*

July the 31st, 1749.

Vide title *Baron and Feme, under the Division, Rule as to a Possibility of the Wife.*

April the 4th, 1749.

Ex parte Newton, and others, in the Matter of *Reeves*'s Bankruptcy.

Case 43.

Where an assignee becomes bankrupt, and is removed, his assignees as well as himself, must join with the commissioners in executing an assignment to the new assignees.

TIMBREL, an assignee under a commission of bankrupt against *Reeves*, became a bankrupt himself afterwards, and thereupon *Newton* and other creditors under *Reeves*'s commission apply by petition to *Lord Chancellor* to remove him, on account of his own bankruptcy, from being an assignee under *Reeves*'s commission, and that they may be at liberty to proceed to a new choice.

Lord Chancellor granted the petition, and was of opinion, that not only *Timbrel*, but his assignees must join with the commissioners in executing an assignment to the new assignees under the commission against *Reeves*; and the order was drawn up accordingly.

(D) *Joint and separate Commission.*

Beasley v. *Beasley.*

After *Hilary* term 1736. In Lincoln's-Inn Hall.

Case 44.

LORD Chancellor: Where there is a joint commission against two partners, they must be each found bankrupt, and though one of them should die, the commission may still go on; but if one of the joint traders be dead, at the time of taking out the commission, it abates, and is absolutely void.

August the 14th, 1742.

Ex parte Turner.

Case 45.

LORD Chancellor in this petition laid it down for a rule that where there is a joint and separate commission, a creditor under the joint commission may come under the separate, and assent or dissent to the certificate of the bankrupt under the separate commission (1).

(1) See *ex parte Sanden, ante* 68. It is now held, that a joint and separate commission cannot legally exist against the same person. 1 *Cooke's B. Laws* 507. *See* In the matter of *Simpson, post.* 138.

Ex parte Sandon. — *March* the 27th, 1743.

Vide under the Division, Commission and Commissioners.

Ex parte Baudier. — *December* the 23d, 1742.

Case 46.

Separate creditors may come in under a joint commission and prove their debts, but where there are two persons who have been partners, and yet the commissions are taken out against them as separate traders, there creditors upon the joint estate, cannot prove their debts under each commission.

A Separate commission taken out against each of two persons who had traded in partnership, which was dissolved before their bankruptcy; the joint creditors petition to be admitted to prove their joint debts under each of their commissions.

Lord Chancellor: Where there is a joint commission taken out against partners, separate creditors may come in under such a commission and prove their debts, and joint creditors shall be satisfied out of the joint estate, and separate creditors out of the separate estate, because the assignment in that case is of the whole estate (1).

But where there are two persons who have been partners, and yet the commissions are taken out against them as separate traders, there creditors upon the joint estate cannot be admitted to prove their joint debts under each commission, for they have an equitable right, in case there should be any surplus of the estates of the two bankrupts, after the separate creditors are satisfied (2).

Nor do I think it proper to appoint a receiver on behalf of the joint creditors, to get in the joint effects of the bankrupt, but they must proceed in the common course, by taking out a joint commission.

(1) *Ex parte Sandon, ante* 68.

(2) See *ex parte Oldknow*, 1 *Cooke's B. Laws*, 290. But it seems now to be settled, that joint creditors may prove under separate commissions, and receive a dividend in proportion with the separate creditors. *Ex parte Haydon*, 1 *Cooke's B. Laws* 292. 1 *Bro. Cha. Rep.* 454. S. C. *Ex parte Copeland*, 1 *Cooke's B. Laws* 295. *Ex parte Hodgson*, 2 *Bro. Cha. Rep.* 5. *Ex parte Page, ibid.* 119. *Ex parte Flintum, ibid.* 120.

Ex parte Bond and *Hill.* — *January* the 22d, 1745.

Case 47.

A joint commission of bankruptcy taken out against two persons, and a separate commission against one, a creditor up[illegible] their joint [illegible] several bon[illegible] not intitled to have a full satisfaction out of both estates at the same time, but must make his election upon which of the estates he will come, in the first place. Such creditor shall have time to look into the accounts of the bankrupt's joint and separate estate, before he makes his election.

A Joint commission of bankruptcy was taken out against *Hiley* and *Rogers*, and a separate one against *Hiley*; the bankrupts became jointly and severally bound to the petitioner *Bond* in 400*l.* and to the petitioner *Hill* in 300*l.* they prove their debts under the joint commission, and receive a dividend of 11*s.* 6*d.* and apply now to be let in as creditors upon the separate estate, equally with the rest of the separate creditors, in order to receive a dividend there likewise.

Ex parte Bond and Hill.

Lord Chancellor: The question is, Whether a creditor upon a joint and several bond is intitled to prove the debt under both commissions at the same time.

I had some doubt the last day of petitions, but, upon searching, I find it has been determined, where there is a creditor on bond against two persons jointly and severally, and both become bankrupt, he is intitled to receive a satisfaction out of the joint estate, and if the joint estate falls short, he is for the residue intitled to a satisfaction out of the separate estate: but then the court will put him to his election, and if he elects to come under the joint estate, he will with respect to a satisfaction for the residue, be postponed to all the creditors of the separate estate.

There are three cases in which this has been determined.

Ex parte Parminter and others, *December* the 24th, 1736.

Lord *Talbot*, in that case, declared, as the two bankrupts *Lavington* and *Paul* were jointly and severally bound, the petitioners the bond creditors were not intitled to have a full satisfaction out of both at the same time, and ordered them to make such election before they received any further dividend.

The second case on the petition of *Elizabeth Abingdon* and others, *March* the 29th, 1737.

There the petitioners were creditors of both bankrupts, by bond joint and several.

A declaration was made in that case, that the petitioners were not intitled to a satisfaction equally with other creditors of the joint estate, or with other creditors of the separate at the same time, but ordered to make an election, and if they elected to come upon the joint estate, then not to come upon the separate estate, till the other creditors upon the separate estate had been first paid.

The third case in the bankruptcy of *Lomax* and *Ashworth*, on the petition *ex parte Banks*, *August* the 6th, 1740 (1). The same declaration of the court in this case as the former.

I shall only add to my order in the present, more than in the former cases, that the petitioners shall have time to look into the accounts of the bankrupt's joint and separate estates, and see which would be most beneficial for them to come upon, in the first place.

It was objected upon the last day of petitions, that this would be contrary to proceedings at law, upon a joint and several bond, where the creditor may proceed against both obligors at the same time, till his debt is fully satisfied, and to be sure it is so at law; but in bankrupt cases, this court directs an equality of satisfaction.

Consider it on the footing of a joint estate first; joint creditors are intitled to a satisfaction out of the joint estate, before separate creditors, but then they have no right to come upon the separate estate for the remainder of their debts, till after separate creditors are satisfied.

(1) *Post.* 106. S. C.

What

What would be the consequence, if the petitioners should be admitted to come on both estates at the same time? Why, then these creditors would draw so much out of the separate estate, as would be a prejudice to other joint creditors, who have an equal right to come upon the separate estate with themselves, and by that means I should give the petitioners a preference to other creditors, when the act of parliament and the equity of this court incline that all persons should have an equal satisfaction, and not one more than another (1). *Ex parte* BOND and HILL.

The petition dismissed.

(1) *Ex parte Rowlandson*, 3 *P. W.* 405. *Blankenhusen*, 1 *Cooke's B. Laws* 304. *Ex parte Banks*, *post.* 106. *Ex parte*

Ex parte Edwards. *January the 21st, 1745.*

Case 48.

Doubtful whether a creditor under a separate commission against *A.* and debtor to a joint commission against *A.* and *B.* can set off the debt he owes the latter, by his demand against the former.

THE petitioner being a creditor under a separate commission against *A.* and debtor to a joint commission against *A.* and *B.* petitioned that the action brought by the assignees for the debt he owed to the joint commission might be staid, and that his demand upon the separate estate might be allowed, as a set-off against the debt he owed the joint estate, especially as the same persons are assignees under both commissions.

Lord Chancellor: I doubt whether this debt could be set off under the statute relating to mutual debts, because different persons are concerned in one debt and in the other, and in distinct rights; but as the petitioner's case appears to be a hard one, I will refer it to the commissioners of the bankrupts, to see how much petitioner owed to the joint estate, and how much was owing to him from the separate estate, and to certify the same to me, and let the action brought by the assignees be stayed, and in the mean time all further consideration reserved till the commissioners have certified (1).

(1) See *Lanesborough* v. *Jones*, 1 *P. W.* 326.

(E) *Rule as to his Executor, or where he is one himself.*

Ex parte Goodwin. *April the 30th, 1740.*

Case 49.

Executor of a bankrupt, unless the commission against his testator be superseded, cannot take out one for a debt due to the testator.

THE executor of a bankrupt, unless the commission against his testator has been superseded, cannot take out a commission of bankrupt for a debt due to the testator, for such debt vested in his assignees, and consequently the executor not intitled at law, to be the petitioning creditor.

Ex parte GOODWIN.

Petitioning creditor shall pay costs of *supersedeas* only, where a commission is superseded merely for a defect in form.

Where a commission is superseded, merely because there was a defect in form, as to the petitioning creditor, but no manner of doubt as to the act of bankruptcy; the costs of the *supersedeas* shall be allowed only, otherwise if the act of bankruptcy had been fully proved.

March the 31st, 1742.

Ex parte Ellis and others, in the Matter of *William Winsmore* a Bankrupt.

Case 50.

Where assignees have possessed themselves of effects which belonged to the bankrupt, as executor only, the Court upon an application of the testator's creditors, will, for the securing his effects, appoint a receiver, to whom the assignees shall account for so much as they have got in of the testator's estate.

WILLIAM Ellis and *Sarah Hodgekins* are bond creditors of *Philip Hughes*, who made his will, and appointed *Thomas Bretenson* and *William Winsmore* executors, who jointly proved the will, but *Bretenson* died before he had possessed any of the assets of *Hughes*, *Winsmore* received part of *Hughes*'s effects, to the amount of 300 *l.* and afterwards a commission of bankruptcy issued against him, and he was found a bankrupt.

The petitioners applied themselves to *Winsmore*'s assignees, to get in the effects of *Philip Hughes*, that they might respectively be paid what is due to them on their bonds; but the assignees insisting that the petitioners ought not to receive the full satisfaction out of the effects, but ought to come in with the other creditors of *Winsmore*, and receive an equal dividend with them: it is therefore prayed, that it may be referred to the commissioners, to inquire what specifick effects of *Philip Hughes* remain unreceived, and that the same may be got in, and the petitioners paid what is respectively due to them before any distribution is made amongst *Winsmore*'s creditors.

Lord Chancellor: I cannot make such order as is prayed by the petition, because *Hughes*'s debts must be paid in a course of administration, and it does not appear to me, but there may be debts of a higher nature.

But then the question will be, Whether I ought to direct the assignees to deliver over *Hughes*'s effects to *Winsmore*, who, though he is a surviving executor, yet, being a bankrupt, may not be quite so proper a person to be trusted.

Indeed, as he acts *in autre droit*, being a bankrupt does not take away the right of executorship, and therefore, strictly he may be the proper hand to receive it; but however, in such a case I ought to secure the effects of the testator, and therefore I will appoint a receiver, to whom the assignees of this commission shall account for so much as they have got in of *Hughes*'s testator's assets.

His Lordship referred it to a Master, to inquire what part of Philip Hughes's *effects hath come to the hands of* Winsmore's *assignees, or which remain unreceived by* William Winsmore *the surviving executor, and that the Master should appoint a receiver of the effects of* Philip Hughes *the testator which are unreceived, and that the assignees of* Winsmore *do deliver over to such receiver, such part of the testator's effects as shall be found to have been received by them,*

them, or to be in their hands in specie, and ordered, that the petioners be paid their respective debts and costs of this application, out of such effects of Philip Hughes *the testator, in a course of administration* (1). *Ex parte Ellis.*

(1) *Ex parte Marsh, post.* 158, 159. 3 *Burr.* 1369. *Ex parte Leeke,* 2 *Bro. Ex parte Lewellyn,* 1 *Cooke's B. Laws* 179. *Cha. Rep.* 596. The *note* under *Howard* and *Jemmet,*

Ex parte Nutt.

August the 6th, 1743.

Case 51.

An executor's selling off the stock of his testator, tho' it consists of wines, and he buys some others to mix with and fine them, will not make him a bankrupt, otherwise if he buys wines intire and sells them intire to his customers.

LORD *Chancellor:* If a person that is a trader, makes another an executor, who only disposes of the stock of his testator, it will not make the executor a trader, and liable to a commission of bankruptcy; and even if an executor, as in the present case, is the representative of a wine-cooper, and finds it necessary to buy wines to refine the stock left by the testator, it will not make him a trader; but here it is sworn the executrix bought wines herself, and sold them to the customers intire; so that it is not true, that she only bought wines to mix and improve the testator's.

Where a person against whom a commission is taken out, has surrendered himself, and acquiesced a year and half since the taking out thereof, the Court will not direct an issue to try the bankruptcy, but leave him to an action at law.

I am of opinion likewise, the act of bankruptcy is plain, but if it had been doubtful, would not have directed an issue, where there has been such a length of time as a year and a half since the taking out of the commission, and where the petitioner has acquiesced the whole time, surrendered herself as a bankrupt to the commissioners, has been examined before them, and, upon her own examination, strong circumstances of bankruptcy have appeared; but if she is really no bankrupt, she is not left without remedy, for she may bring an action of trover against the assignee.

Ex parte Butler, Assignee of *Richardson.*

August the 3d, 1749.

Vide under the Division, Rule as to the Sale of Offices under a Commission of Bankrupt.

(F) *Rule as to Landlords.*

Anon.

April the 30th, 17..

Case 52.

Where a bankrupt's goods are sold by an assignee, a landlord can only come in for his rent pro ratâ with the other creditors.

LORD *Chancellor:* A landlord may distrain for his rent upon a bankrupt's goods, either before or after the assignment under the commission (1); but if he neglects to do it, and

(1) *Ex parte Plummer, post.* 103.

Anon. suffers them to be sold by the assignees, he can only come in upon an average with the rest of the creditors (1).

A mortgagee who has paid the arrears of rent on a bankrupt's estate, unless he has an order to stand in the landlord's place, shall not be preferred to the creditor's under the commission.

A mortgagee of a bankrupt's estate, though he pays the arrears of rent, that is due to the bankrupt's landlord, unless he applies to the court for an order that he may stand in the place of the landlord, in consideration of his paying the arrears of rent, shall not be preferred to the creditors under the commission.

(1) *Ex parte Deschармes*, *post*. 103. *Devise*, 1 *Cooke's B. Laws* 216. *Bradyl Ex parte Grove*, *ibid*. 104. *Ex parte* v. *Ball*, 1 *Bro. Cha. Rep*. 427.

March the 31st, 1742.

Ex parte Descharmes.

Case 53.

If the landlord of a bankrupt suffers his assignees to sell off his goods, he is not intitled to his whole rent, but must come in *pro ratâ* with other creditors under the commission.

THE petitioner was the landlord of the bankrupt, and now prefers his petition to *Lord Chancellor* to be paid by the assignees under the commission, the rent that was in arrear all the time the commission was taken out.

It appeared in evidence, that the whole estate and effects of the bankrupt were possessed by the assignees, duly chosen under the commission, and sold by them seven years ago by virtue of the assignment.

Mr. *Murray*, the counsel for the petitioner, insisted that he being the landlord is intitled to his whole rent, and is not obliged to come in *pro ratâ* with the rest of the creditors.

Lord Chancellor: The landlord's demand is too stale, and having lost his remedy by distress, as there are no goods upon the premisses, he can now be considered only as a common creditor, and must come in *pro rata*.

April the 4th, 1739.

Ex parte Plummer.

Case 54.

A landlord may distrain for his whole rent even after assignment or sale by the assignees, if goods are not removed.

THE question was, Whether after a commission of bankrupt taken out, and the messenger in possession, the landlord should distrain the goods upon the premisses, and so be satisfied his intire debt, or whether he should come in *pro ratâ* with the rest of the creditors under the commission.

Lord Chancellor: If any goods remain on the premisses, they are liable to the distress of the landlord, and he may distrain them for his intire debt, even after assignment or sale by the assignees, if the goods are not removed (1); and this is the reason, because no provision is made in the case of bankruptcy in the statute, which gives the landlord a year's rent on executions.

Assignment has a retrospect so as to avoid any mesne acts done by the bankrupt.

Before assignment the property remains in the bankrupt, (and the commissioners have only a power) though the assignment has a retrospection so as to avoid any mesne acts done by the bankrupt.

(1) See *Buckley* v. *Taylor*, 2 *Durn.* and *East's Rep*. 600.

The rent is here a year and a quarter, and I am of opinion that the landlord is intitled to distrain the goods remaining on the premisses for his whole rent, notwithstanding the commission of bankruptcy and the proceedings thereon. There was a case before the Lords Commissioners of the Great Seal, where the landlord, though he had made no distress, yet was considered to be within the equity of the statute, which gives him a year's rent upon executions; a commission of bankrupt being an execution in the first instance.

Ex parte PLUMMER.

The two following cases were cited: *Ex parte Jacques, Dec.* 14, 1730. *The landlord distrained, when the messenger under the commission of bankrupt was in possession before the assignment: afterwards the assignees were chosen, and petitioned* Lord Chancellor King *to have the goods restored, but the petition was dismissed.*

Ex parte Dillon, Feb. 27, 1733. *The assignees of the bankrupt were in possession, and the landlord distrained; upon the application of the assignees to* Lord Chancellor *to be relieved, and the goods to be re-delivered, his Lordship confirmed the right of the landlord to distrain, and dismissed the petition.*

Ex parte Grove (1).

April the 11th, 1747.

Case 55.

A Commission issued against *A.* who was a tenant of *B.*'s, and owed him twelve year's rent. *B.* the landlord comes in and proves his debt under the commission, and the assignees sold the whole goods to *Grove* the petitioner, who lived in the tenant's house; the landlord, three years after proving of his debt, distrains upon those goods, as being still upon the premisses.

The question was, Whether proving it as a debt under the commission, and swearing he has no security, is not a waiver of his right to the goods as a landlord?

Commission against *A.* who owed *B.* 12 years rent. *B.* proves the debt under the commission, the assignees sell the goods of *A.* to the petitioner who lives in *A.*'s house. *B.* 3 years after proving his debt distrains on those goods as being still upon the premisses. The vendee of the goods is intitled to them, and the proceedings of *B.* upon his replevin restrained and confined to his remedy under the commission.

Lord Chancellor: The issuing a commission against a tenant, and the messenger's possession of the goods of the tenant, does not hinder the landlord from distraining for rent; for this is not such a *custodia legis* as an execution is, and there too the law allows the landlord a year's rent.

The assignment of the commissioners of the bankrupt's estate and effects, is only changing the property of the goods, and while upon the premisses they are still liable.

Notwithstanding a commission, and the messenger is in possession of the goods, the landlord may distrain for the rent, even after an assignment, if the goods are on the premisses.

The fact that creates the difficulty is, the landlord's coming in under the commission.

A man who has a debt may come in and prove his debt, and afterwards he may bring an action at law, and the court will

(1) See *ex parte Devine*, 1 *Cooke's B. Laws*, 216. and Lord *Bathurst*'s observations on this case.

not

Ex parte GROVE.

not absolutely stop him from bringing an action, but put him to his election, and even then allow him to assent or dissent to the certificate.

A landlord is considered in a higher degree than a common creditor, and it would be hard to preclude him from distraining where there are goods on the premisses, and therefore he must be put to his election to waive his proof, or his distress.

But the difficulty lies here, every creditor is to swear whether he has a security or not: if he has a security and insists upon proving, he must deliver up the security for the benefit of the creditors at large, be they mortgages or pledges; but this seems to be a new case, because this is a legal lien which the landlord has, and not upon the same footing with common securities; and the only question is, Whether his proving it as a debt, and swearing he has no security, is not a waiver of the distress?

A creditor, after he has received a dividend under a commission, will be allowed to bring an action at law for his debt, upon his refunding that dividend.

Lord Chancellor directed it to stand over till the next day of petitions, as thinking it a doubtful case, and on that day said he was far from being clear that the landlord was barred of his distress; for there have been instances, where a common creditor, even after he has received a dividend under a commission, has been allowed, upon refunding that dividend, to bring an action at law for his debt; and as a landlord's is a more favourable case than a common creditor's, he ordered it to stand over again for further consideration.

On the 8th of *May*, 1747, this petition came on again, and his Lordship then declared that the vendee of the goods under the assignee is intitled to the goods, and ordered, that the proceedings of *William King*, the landlord, upon the replevin should be restrained, and confined him to his remedy under the commission.

(G) *Rule as to Compositions.*

November the 6th, 1740.

Case 56.

A. being upon an agreement for a composition, gives one of his creditors, who would not consent to it otherwise, a bond for the residue, over and above his composition; such a contract, though not void by the express words of the 5th of George the Second, seems to [illegible] within the [illegible]son and design [illegible] the act.

Spurret v. *Spiller*.

THE plaintiff in this cause being upon an agreement with his creditors in general, for a composition of six shillings in the pound, the defendant, one of the creditors, would not consent to it, unless the plaintiff would give him a bond for the residue of his debt over and above his share of the composition.

The plaintiff, in order to extricate himself out of his difficulties, did give a bond to *A.* in trust for the defendant.

The composition money has been paid to the rest of the creditors, and likewise to the defendant, who has brought an action on his bond in the name of the trustee, and notice of trial is given for the 14th instant.

Mr. *Charles Clarke* moved for an injunction to stay proceedings at law, till the hearing of the cause in this court.

Lord Chancellor: Take the injunction upon giving judgment, and a release of errors, it being a case very proper to be considered; for suppose a creditor upon a commission of bank-

ruptcy taken out, enters into a private agreement with the bankrupt to sign his certificate, upon his promise or contract to pay this creditor's whole debt, in consideration of his signing the certificate, there is no doubt but such a contract would have been void by the express words of the statute of the 5th of the present King. *Spurret v. Spiller.*

The question is, Whether such an agreement as in the present case, though clearly out of the act of parliament, is not within the reason and design of the act, and the very mischief that is expressly condemned by it, and endeavoured to be remedied? For this is not only prejudicial to the bankrupt, but may be hurtful to the creditors in general, because a person who has a composition on foot may (by entring into a contract to pay the whole debt to one or more obstinate creditors, as a consideration of their promising not to appear, or not to oppose the composition) deceive the bulk of the creditors, who imagine the debts standing out against his estate are not so numerous as in fact they are (1).

(1) So *Chesterfield* v. *Janssen*, *post*. 352. *Smith* v. *Bromley*, and *Jones* v. *Barkley*, *Dougl.* 670. *Cowp.* 792. *Cockshott* v. *Bennett*, 2 *Durn.* and *East's Rep.* 763. *Jackson* v. *Duchaire*, 3 *Durn.* and *East's Rep.* 551. *Jackson* v. *Lucas*, 4 *Durn.* and *East's Rep.* 166. The Case of *Sumner* v. *Brady* 1 *H. Black. Trin Rep.* 647. *contradicts* the authority of *Lewis* v. *Chase*, 1 *P. W.* 620. In *Trueman* v. *Fenton*, *Cowp.* 544. the creditor received no benefit or dividend under the commission of bankruptcy against the debtor, and the *note* there given was for a *less sum* than, though in *satisfaction* for, what was really due. See *ex parte Burton*, *post*. 255.

(II) *Rule as to Creditors.*

Ex parte Banks. *August the 6th, 1740.*

Case 57.

A Joint commission only taken out against two partners; the petitioner a bond creditor to whom the bankrupts were jointly and severally bound, he may make his election to come upon the joint, or separate estate; if upon the former, he cannot come upon the latter (and so *vice versa*) for the surplus of the debt, till the creditors of the separate estate are first served.

A bond creditor to whom the partners were jointly and severally bound, may make his election to come against the joint or separate estate, but not against both, except for the deficiency, and after the other creditors are paid.

Lord Chancellor founded his order upon this reasoning, because the bond creditors might have brought a separate action at law against each of them, and might have had likewise separate executions, but could not have levied his debt upon both the estates at the same time, but only for the deficiency, where one estate was not sufficient to satisfy the whole (1).

(1) See *ex parte Bond* and *Hill*, *ante* 98.

April the 20th, 1741.

Case 58.

Where a meeting of creditors is properly advertised, and some do not think proper to come, the majority in value who are present have a right to bind those who are absent.

Cooper and others *vers.* *Pepys* and others.

WILLIAM REEVES gave notes payable to *Moses Andrees* to the amount of 4500*l.* *Andrees* indorses them over to several persons, and then goes beyond sea, with the greatest part of his effects, and becomes a bankrupt; the indorsees come upon *Reeves* the drawer for the money due upon the notes, who, being unable to pay them, becomes a bankrupt likewise.

[*107] *The assignees under *Reeve's* commission (of whom two were note creditors) give notice pursuant to the act of the 5th of *George* the Second, that there would be a meeting of the creditors under *Reeve's* commission, in order to accept of a composition from the agents of *Andrees*.

Several of *Reeve's* creditors met accordingly, and it was agreed to accept 6*s.* in the pound for the debts due on those notes, and to execute a release to *Andrees* upon those terms; and a proper authority in writing, signed by all the creditors present, was given to the defendants, the assignees, to compound with *Andrees*, who on the 5th of *September*, 1735, executed a release accordingly to *Moses Andrees* on payment of the composition aforesaid.

The plaintiffs who are creditors at large of *William Reeves*, in less than four months after the issuing of the commission of bankruptcy against him, prefer a bill in chancery, to which the assignees are made defendants, suggesting it was a fraud in them to agree to this composition, and that they consulted nothing but their own private interest, as being creditors by indorsement of some of *Andrees's* notes.

Lord Chancellor: I do not see any thing fraudulent in the conduct of the assignees, for they have done every thing which the act of parliament prescribes on meetings for a composition of debts, and if some of the creditors do not think proper to come, 'tis their own fault, and those who are present have a right to bind the whole, if the majority in value at the meeting are of opinion to sign the composition.

But with respect to the bill itself, so far as relates to the assignees of *Reeves*, I disapprove of it extremely, because it is an attempt to make the court judges in what manner the estate and effects of a bankrupt should be distributed, before the expiration of 4 months from the date of the commission, whereas the act allows the assignees a complete 4 months from the issuing of the commission to make a dividend; so that it is absolutely changing the method chalked out by the act, and ought to meet with the utmost discouragement.

His Lordship therefore ordered the bill to stand dismissed against the assignees of *Reeves*, with costs to be taxed.

A doubt arose, whether the creditors who had accepted composition of six shillings in the pound for their demands o

Where drawer and indorser of notes are both become bankrupt, and the creditors have received a dividend of 6s. under the commission against the indorser, they can only prove the remaining 14s. under the commission against the drawer.

Andree

Andrees, might, notwithstanding, prove their whole debt in the commission against *Reeves?* At first *Lord Chancellor* seemed to think they might still prove their whole debt, but upon looking into two cases in 2 *Wms.* 89*, the first, *ex parte Ryswicke*, before *Lord Chancellor Macclesfield*; the second†, *ex parte Lefebere* 407. before *Lord Chancellor King*, he altered his opinion, and was very clear that the 6*s.* must go in discharge of so much of the debt, and that they could only prove the remaining 14*s.* under *Reeves*'s commission (1). COOPER v. PEPYS. [108]

* *Ex parte Ryswicke*, 2 *Wms.* 89. *A.* drew a bill payable to *B.* on *C.* in *Holland*, for 100*l.* *C.* accepts it, afterwards *A.* and *C.* become bankrupts, and *B.* receives 40*l.* of the bill out of *C.*'s effects, after which he wanted to come in as a creditor for the whole 100*l.* out of *A.*'s effects. *B.* permitted to come in as a creditor for 60*l.* and the Master directed to see whether the other 40*l.* was paid out of *A.*'s effects in *C.*'s hands, or out of *C.*'s own effects; if the latter, then *C.* is a creditor for this 40*l.* also, but if out of *A.*'s effects, then 40*l.* of the 100*l.* is paid off.

† *Ex parte Lefebere*, 2 *Wms.* 407. *A.* gives a promissory note for 200*l.* payable to *B.* or order. *B.* indorses it to *C.* who indorses it to *D.* *A. B.* and *C.* become bankrupts, and *D.* receives 5*s.* in the pound on a dividend made by the assignees of *A.* *D.* shall come in as creditor for 150*l.* only out of *B.*'s effects.

(1) See *ex parte Wildman*, *post.* 109.

Ex parte Whitechurch. *August* the 13th, 1742.

Vide under the Division, Rule as to Assignees.

Ex parte Simpson and others. *August* the 1st, 1744.

Vide under the Division, Commission and Commissioners.

Ex parte Simpson and others. *December* the 22d, 1744.

Vide under the same Division.

Ex parte Kirk. *October* the 26th, 1745.

Case 59.

A Creditor under a commission of bankruptcy against *Ovie*, being indebted to the petitioner in 79*l.* drew a note on the assignee of the commission as follows: *Pray pay to Kirk or order the sum of* 79l. *out of my share of the dividend hereafter to be made under the commission against* Ovie.

The assignee accepts it by parol, but before any dividend he becomes a bankrupt himself; the creditors under his commission insist, that *Kirk* ought to come in *pro ratâ* only, for that it was not a legal acceptance.

B. a creditor under a commission for 79*l.* draws on the assignees for that sum, payable to *K.* or order, out of *B.*'s share of the dividend to be made, assignee accepts it by parol, but before any dividend becomes a bankrupt himself. *K.* intitled to the whole 79*l.* and not obliged to come in *pro ratâ* only, under the commission against the assignee.

Lord

Ex parte Knox.

Lord Chancellor: Though this is not a legal bill of exchange at law, yet it is good in equity, the petitioner having paid a valuable confideration for it, and it was a lien upon the effects of *Ovie* as foon as they came to the affignee's hands, and is like the cafe of a bond affigned by a perfon before he becomes a bankrupt, which is a good affignment in equity, and the affignee thereof is intitled to retain the bond againft the creditors under the commiffion.

His Lordfhip directed the 79*l.* to be paid to the petitioner.

March the 13th, 1737.

Twifs v. *Maffey.*

Vide under the Divifion, Commiffioner and Commiffioners.

June the 4th, 1746.

Ex parte Botterill.

Cafe 60.

Where a bankrupt is in execution for one debt, and the judgment creditor has another againft him of a diftinct nature, he may prove this under the commiffion, notwithftanding he refufes to waive his execution upon the other.

THE bankrupt borrowed 100*l.* upon bond of the petitioner, a near relation; the petitioner had arrefted him on this bond, and charged him with execution, and had another demand for a year's rent.

The petitioner would not waive his execution upon the bond debt, and yet offered to prove the debt for rent under the commiffion; but the commiffioners refufed to admit him, unlefs he would waive his execution.

Upon this he petitions to be admitted a creditor for the rent.

Lord Chancellor: I think it a hard cafe upon the bankrupt, but as the debts are intirely diftinct, I think he fhould be allowed to prove, notwithftanding he refufes to waive his execution (1).

But upon looking into the petitioner's affidavit, and finding it defective, as he did not fwear to the time when the bankrupt commenced tenant, he difmiffed the petition, and faid at the fame time, that he was fatisfied this debt was an after-thought, and trump'd up merely to perfecute the bankrupt, by keeping him in gaol, and therefore recommended it to the petitioner's attorney to make it up, and releafe the bankrupt from his confinement.

(1) *Ex parte Mathews, poft.* 3 *vol.* 817. *Ex parte Crinfoz,* 1 *Bro. Cha. Rep.* 270.

December the 20th, 1750. S. C. 2 Vez. 113. pl. 46.

Ex parte Wildman.

Cafe 61.

The petitioner creditor of a bankrupt who gave him befides bills of exchange on merchants in *Holland* that made themfelves liable by acceptance.

LORD Chancellor: The prefent petitioner was creditor of a bankrupt, who had given him bills of exchange on *Vanvillen*, and others in *Holland*, who made themfelves liable by accepting them, and afterwards failed and compounded with their creditors.

So that the petitioner had two perfonal fecurities.

Confider it in the common cafe, abftracted from the cafes of bankrupts.

Suppofe

Suppose several obligors, the obligee may have several actions against them all, several judgments too, and several executions; but he shall not levy more than *one* satisfaction for his debt; if he does, courts of law will step in. The same in bills of exchange, actions, &c. lie against drawer and all the indorsers, but only *one* satisfaction for the debt.

Exparte WILDMAN.

An obligee may have several actions against each obligor, but shall not levy more than one satisfaction for his debt.

So under commissions of bankruptcy, the creditor is intitled to come under the commission against all the obligors, drawers, &c. and this is not a preference given to such a creditor, but a benefit he is intitled to at law, upon all his securities, till he is compleatly satisfied. There are two persons at stake for this debt, one of them a bankrupt, and the other has made a composition of 10 *s.* in the pound.

A creditor is intitled to come under a commission of bankrupt against all the obligors, drawers of notes, &c. till he is compleatly satisfied.

The petitioner had received nothing under the composition at the time he proved his debt under the commission of bankruptcy, and therefore admitted a creditor for the whole.

Petitioner admitted under the commission for his whole debt, and before a dividend receives 2 *s.* 6 *d.* in the pound, under a composition of the acceptors of the bills.

But before a dividend he receives 2 *s.* 6 *d.* in the pound under the composition of the acceptors of the bills.

The commissioners in the commission of bankruptcy direct he shall be paid his dividend, after deducting what he had received on the bills of exchange.

The assignees say he shall be paid a dividend only on the sum left after deducting the 2 *s.* 6 *d.*

The assignees insist, he shall be paid a dividend on the sum left only, after deducting the 2 *s.* 6 *d.*

But this would be taking away from a man the double security he had, and which he may make use of in law and equity, till he is satisfied his whole debt.

As this composition was not paid him till after his debt proved, he shall receive a dividend on the whole debt, and shall account hereafter for what he has received, or shall receive on the bills of exchange; and this will not be any prejudice to the estate, for if he receives more from those bills of exchange than will answer twenty shillings in the pound, he shall account to the assignees for such surplus.

But as the composition was not paid till after the debt proved, he shall receive a dividend on the whole sum.

Ordered therefore the petitioner to be let in to a dividend on his whole debt *pro ratâ* with the other creditors.

Mr. *Clark* for the assignees cited the case of *Cooper* versus *Pepys*, to shew that the court would not admit a person who had received a dividend of six shillings against the drawer, to prove more than the remaining fourteen shillings as a creditor under the commission against the indorsee.

Vide ante, p. 108.

[111]

Lord Chancellor said, this differed from that case because the creditor there had received the benefit before he had attempted to prove his debt against the indorsee under the commission.

Ex parte Child: In the matter of *Cuff* a bankrupt.

March the 28th, 1751.

Case 62.

Cuff had been for several years a collector of the land-tax for the parish of St. *Dunstans* in the *West*, and at the issuing of the commission owed upon the balance 928 *l.* 11 *s.* to the chamberlain of *London*.

THE petitioner prays, he may, for himself and the rest of the parishioners of St *Dunstans* in the *West*, be admitted a creditor, under the commission against *John Cuff* a bankrupt, for the sum of 869 *l.* 8 *s.* 1 *d.* the balance of the money had and received by *John Cuff* from the said parishioners.

An inhabitant of the parish admitted a creditor, and allowed to prove for himself and the rest of the parishioners.

The bankrupt was duly appointed collector of a re-assessment of the land-tax for 1747. for the first division of the said parish, and since of the whole land-tax for years 1748, 1749, and 1750, and as such received of the several inhabitants for the land-tax and window duties several sums of money, amounting in the whole to 3391 *l.* 10 *s.* and hath only paid to the chamberlain of *London* 2522 *l.* 1 *s.* 11 *d.* which left the balance aforesaid.

Mr. *Green* for the petitioning creditor said, the only doubt was, Whether the commissioners according to the form of depositions of debts could suffer one inhabitant to swear, that neither he or any other of the inhabitants had received any security or satisfaction.

Lord Chancellor thought in this case, one inhabitant might prove for himself and the rest of the parishioners, and ordered it accordingly, because he might swear, that neither he or the rest of the parishioners to his knowledge or belief had received any security or satisfaction.

Ex parte Peachy.

November the 2d, 1754.

Case 63.

Where a person stays till a bankrupt and the assignees are dead, and 15 years after the date of the commission, applies to be admitted a creditor, the court on these circumstances, and in consideration of the length of time, will dismiss the petition.

A Commission of bankruptcy taken out in 1739, the bankrupt dead, and the assignee also dead, and now at the * distance of 15 years, the petitioner applies to prove a debt which depends upon an account said to be settled between him and the bankrupt.

What the petitioner attempts to prove is over and above his debt for rent. Upon the 26th of *December* 1739, the goods being on the premisses, he made a distress for rent; the bankrupt was the only person who knew what was received under the distress, and it was admitted by the petitioner himself it exceeded the appraisement; and the bankrupt being dead, it was insisted by the counsel for the creditors, that this is an unfavourable application, especially as it rests upon the oath of the petitioner, that he was a stranger to the dividend made under this commission till 1745, and taking into consideration likewise, the great length of time since the suing of the commission.

[*112]

Lord Chancellor: The question is, Whether there is sufficient disclosed in this case to warrant me in making an extraordinary order to admit the petitioner a creditor under this commission.

The court, to be sure, is very liberal in admitting persons to dividends, but the present application seems to be of a very unreasonable nature.

The

The commission issued as long ago as the 9th of *February* 1739: the account made up between the petitioner and the bankrupt the 13th of *December* before, which shews they were very amicable then, and yet, upon the 26th of the same month, the petitioner is so adverse as to take a distress. This is very extraordinary, the arrears of rent for 13 years amounted to 400 *l.* levies upon the distress 260 *l.* being about five eighths of the balance of the account; his ignorance is not of the commission, but of the dividend only; lies by for 15 years without taking one step, and after the bankrupt is dead, and the assignee, who might give some account of this transaction, is likewise dead, applies to be admitted as a creditor; so that, taking it altogether, it stands upon very suspicious circumstances. *Ex parte* PEACHY.

The creditors under the commission will not receive above nine shillings in the pound; the petitioner has had under the distress a large sum, of which he has been making interest, and is much better off than any other creditor.

Upon all the circumstances of the case, I am of opinion he ought not to be admited a creditor; and therefore let the petition de dismissed (1).

(1) *Vide* 1 *Cooke's B. Laws*, 541. *sec.* 2.

(I) *Contingent Debts.* [113]

Ex parte Elizabeth Greenaway: In the Matter of *Edward Greenaway* a Bankrupt. *December* the 23d, 1740.

Case 64.

Petitioner's husband before marriage gave her father a bond in the penalty of 600 *l.* conditioned for the payment of 300 *l.* to her in case she survived him, he has a commission of bankruptcy taken out against him, and dies in ten days after. The court thinking it a doubtful case, whether she should or should not be admitted a creditor, did not give an absolute opinion: but on assignees consenting she should come under the commission for 150 *l.* ordered her a dividend accordingly.

EDWARD Greenaway, previous to his marriage with the petitioner, *gave his bond to the petitioner's father in the penalty of* 600 *l. in trust, that if the marriage should take effect, and the petitioner should survive* Edward Greenaway *and if he should before his death by will or otherwise give or leave the petitioner* 300 *l. in goods or other personal or real estate, so as the same should be paid by his executors or assigns immediately after his death to the petitioner, without any claim by any person or persons whatsoever, then the bond was to be void.*

In *May* 1731, the marriage was had between *Edward Greenaway* and the petitioner, and on the 17th of *September* last a commission of bankruptcy issued against *Edward Greenaway*, whereupon he was declared a bankrupt, and on the 28th of *September* following, the bankrupt died insolvent, before any distribution of his estate, and the petitioner has since duly proved the bond before the commissioners, but the assignees refuse to make any dividend to the petitioner.

She therefore prays, as the husband made no other provision for her in his life-time, that she may be let in to receive her dividend, out of the bankrupt's estate and effects, in equal degree with the other creditors.

Ex parte GREENAWAY.

The counsel for the petitioner insisted, that though it was a contingent debt, yet the foundation of it was the bond, and therefore notwithstanding the contingency has happened since the bankruptcy, yet the wife was intitled to prove the debt, as well as any other creditor.

The statute of 7 *Geo.* 1. *cap.* 31. extends only to creditors at a future day certain, and not to debts on mere contingencies which have not happened at the time of the act of bankruptcy committed.

The Attorney-general, who was counsel for the assignees, insisted the petitioner is not within the statute of the 7 *Geo.* 1. *cap.* 31. as it is not a debt that will at all events become due at a future day, and uncertain whether it can ever take place, and relied upon the case of *Tully* v. *Sparks*, 2 L. *Raym.* 1546. where, it being likewise uncertain whether the bond in that case would ever become due or not, being not to take place except upon two contingencies, which had not both happened at the time of the act of bankruptcy committed, it was impossible to make such abatement of the five *per cent.* as the act directs, and therefore the court of King's Bench unaminously held the bond was not within that act.

[114]

Lord Chancellor: The question his, Whether this is not a debt become due before the estate is distributed, and it would be the hardest case in the world, if such a person should not be admitted a creditor before the estate is divided away.

The penalty in an obligation is *debitum in præsenti*, and the condition only suspends it, so that it is looked upon as a debt from the time of the execution of the bond.

There are great variety of determinations in the books, and therefore I desire that one counsel of a side may speak to it, on the next day of petitions, unless the creditors, at a meeting for this purpose, will agree to give a sum of money to this poor woman, in lieu of her share upon the dividend of the bankrupt's effects.

The petition was set down again in the paper of petitions of the 24th of *January* 1740, when it appeared that the rest of the creditors, since the hearing of the petition before *Christmas*, had come to an agreement, to let in the wife of the bankrupt as a creditor for 150*l.* half of the bond debt only, and that it was acquiesced under by the petitioner.

All the cases since *Tully* v. *Sparks*, 2 L. *Raym.* 546. have been determined against a contingent interest.

Lord Chancellor: I am very glad you have compromised it, for it is a matter attended with great difficulties, and there has not been one case since *Tully* and *Sparks* in the court of King's Bench, but what has been determined expressly against a contingent interest.

The distinction taken in this court has been between a trust for the wife, and a bond absolutely given to the wife herself before marriage upon a contingency of her surviving the husband: This is materially different from a trust, because there a person who comes for equity must do equity, as in the case of *Holland* v. *Culliford*, 2 Vern. 662.

The most material case to the present purpose is, *ex parte Caswell, ex parte Cazald, ex parte Bateman*, 2 Will. 497, *There a trader on marriage gives a bond to a trustee to secure a thousand pound to a wife, if she survived him; the trader becomes a bankrupt; this debt not to be allowed; nor any reservation to be made for it; nor shall it stop the distribution, in regard it may never be a debt: But if the* con-

contingency happen before the bankrupt's estate be fully distributed, such creditor shall come in under the commission. Ex parte GREENAWAY.

His Lordship, without giving any opinion absolutely, one way or the other, *ordered the petitioner to be admitted a creditor under the commission, for the sum of* 150 *l.* (the assignees consenting thereto in court) *in full of her demand mentioned in the petition, and that she should be paid a dividend in respect thereof, in equal proportion with the other creditors of the bankrupt* (1).

(1) See next case, and *Ex parte Mitchel post.* 120.

Ex parte Groome.

October the 20th, 1744.

Case 65.

Davies 524. S. C.

A husband, by articles previous to marriage, covenants to leave his wife 600 *l.* in case she survives him; he becomes a bankrupt, and dies before any dividend made, the wife, as the law now stands, cannot be admitted a creditor under a commission against the husband.

ON articles previous to the marriage of the petitioner, the husband covenants to leave his wife 600 *l.* on the contingency of surviving him; a commission of bankruptcy is taken out against the husband, who dies before any dividend is made: the petitioner attempted to prove the 600 *l.* as a debt before the commissioners, but they refused her, and therefore applies now by petition to be admitted a creditor for 600 *l.*

Mr Solicitor-general for the petitioner cited 2 *Will.* 497. intitled *ex parte Caswell*, &c. to shew, that though the debt was contingent, when the obligor became a bankrupt; yet if the contingency happen before the distribution made, then such contingent creditor should come in for his debt: so if such contingency had happened before the second dividend made, the creditor should come in also for his proportion thereof, though after the first dividend.

Mr. *Talbot* of the same side stated, that the petitioner married in 1742, and brought 600 *l.* fortune; the husband soon after becomes a bankrupt, and her money has contributed to satisfy his creditors: insisted this is a debt arising on a consideration prior to the act of bankruptcy, and as the husband is now dead, the debt may be said to have a relation to the day of the contract.

Mr. Attorney-general for the assignees insisted, that under the act of parliament of the 13 *Eliz. cap.* 7. no person can be intitled to a distribution but who is a creditor at the time of the commission issued, and the commissioners are thereby directed "*to order the* "*same for true satisfaction and payment of the said creditors.*"

The statute of the 5th of *George* the 2d, *cap.* 30. in a clause relating to certificates, says, "That such bankrupt who after obtain-"ing thereof shall be taken in execution or detained in prison on "account of any debts *due or owing before he became a bankrupt*, "shall be discharged out of custody on such execution, &c."

But if the construction of this act should be that the bankrupt is liable to contingent debts that become due *after* the bankruptcy, and then he is not discharged, such a construction would intirely overturn this act of parliament.

The judges were of opinion, in a case upon the construction of the old acts of parliament relating to bankrupts, that a creditor whose

Ex parte GROOME. whose debt was contracted before, but did not become due till the act of bankruptcy committed, could not take out a commission; but on an appeal afterwards to the house of Lords, it was there determined otherwise.

He cited the case *ex parte Smith*, the 23d of *January* 1741, in which a contingent creditor, who applied to be admitted to prove his debt, was denied by the court, and another case, *ex parte King*, *January* 1742 (1), where it was also denied.

[116] Mr. Solicitor-general in his reply said, that these two cases were not absolutely determined, and there is no one case where Lord *King*'s distinction in *ex parte Caswell* has been controverted.

He insisted that the cases make no distinction between a bond and a covenant, and that there is no clause in any act of parliament which confines the distribution to creditors only at the time of the bankruptcy committed, or excludes creditors whose contingent debts take place before distribution.

Before the statute of the 7 *Geo.* 1. *cap.* 31. he said, there was no doubt at all but the creditor might come in when the debt became payable, but the only doubt was, Whether they might come in before; therefore to remedy this inconvenience *of the effects being divided away before such creditor could come in*, the act enables them to prove their several securities before they become payable.

Lord Chancellor ordered it to stand over till this day, that he might give his opinion at the same time upon another contingent case *ex parte Winchester*, which came on two days after the case *ex parte Groome*.

The state of the case *ex parte Winchester* (2).

Previous to the marriage of the petitioner with *Elizabeth Grant*, daughter of the bankrupt, " by an indenture dated the 2d of *July* " 1739, made between the petitioner of the one part, and *John* " *Grant* the bankrupt, and *Elizabeth* the petitioner's wife of the " other part, reciting the then intended marriage between the pe- " titioner and *Elizabeth*, and that *John Grant* had before the ex- " ecution of the indenture paid the petitioner 500 *l.* and by a bond " dated the same day secured 1000 *l.* more to be paid to the peti- " tioner, his executors, administrators and assigns within 12 months " after the death of the survivor of *John Grant* and *Barbara* his " wife, together with interest for the same at 4 *l. per cent. per ann.* " by equal half yearly payments, which 500 *l.* then paid, and 1000*l.* " secured to be paid, was declared to be in full for the wife's por- " tion: It was agreed, and the petitioner covenanted with *John* " *Grant*, that the petitioner's heirs, executors or administrators, " should within one month after the petitioner's death, pay to " *John Grant*, his executors or administrators, the sum of 2000*l.* " to be placed out at interest for the petitioner's wife, and the is- " sue of the marriage; and it was also agreed, that the 2000*l.* " and the 1000 *l.* when due, should be placed out at interest in the " names of two trustees, in trust after the death of the survivor " of petitioner and his wife, to distribute the 3000 *l.* among the

(1) *Davies* 254. S. C. (2) *Davies* 530. S. C.

" children

"children in ſuch proportions as the petitioner and his wife ſhould "direct, and for want of ſuch direction, in truſt to divide the "ſame between ſuch children equally, and in caſe there was no "iſſue of the marriage, to pay 1000 *l.* part of the 3000 *l.* to ſuch "perſons as the petitioner's wife ſhould appoint, and for want of "ſuch appointment, to the petitioner, his heirs, executors or ad-"miniſtrators. *Ex parte* GROOME.

The marriage was accordingly had between the petitioner and *Elizabeth Grant*, and there was iſſue of the marriage living three children. *John Grant regularly paid the intereſt of the bond to the* 25th *of December laſt*, but no payment had been ſince made, and the condition of the bond was broken by the non-payment of the intereſt, which became due to the petitioner on *Midſummer* day. [117]

In *April* laſt a commiſſion of bankruptcy iſſued againſt *John Grant*, and he was thereon declared a bankrupt, and aſſignees choſen, but no dividend yet made of the bankrupt's eſtate, and the petitioner has applied to the commiſſioners to be admitted a creditor for the ſaid ſum of 1000 *l.* but ſuch ſum not being payable till after the death of *John Grant*, and *Barbara* his wife, the commiſſioners refuſed to admit the petitioner a creditor; and therefore he preferred his petition *to be admitted a creditor for the principal ſum of* 1000 l. *and that the dividends thereof might be laid out in the purchaſe of South-Sea annuities, for the benefit of the petitioner, his wife and children*; *and alſo prays to be admitted a creditor under the commiſſion for* 20 l. *being the half year's intereſt due on the bond at Midſummer laſt.*

Lord Chancellor: Theſe are ſometimes caſes of value; more often caſes of hardſhip and compaſſion. It were to be wiſhed that they were provided for by act of parliament, and I hope ſome gentleman who hears me will conſider how to rectify this by ſome future ſtatute.

There have been a great many caſes in this court upon this point; ſome where a huſband before a marriage has contracted with truſtees for the wife, to pay a ſum of money in his life-time for her benefit, *if ſhe ſurvives*, and if ſhe dies, for children; and if no children, for the benefit of the huſband. See Davies 535.

There have been other caſes where the time of payment does not ariſe, till the contingency takes effect after the death of the huſband.

And there have been other caſes, where the father of the wife has entered into a covenant to pay a ſum of money after the death *himſelf and his wife*, and intereſt in the mean time, which is the preſent caſe, *ex parte Wincheſter*, and other caſes like that, *ex parte Groome*.

They will fall under very different conſiderations, and I will give my opinion upon all of them.

If a huſband becomes a bankrupt after a breach of payment to truſtees, they have always been admitted creditors upon equitable terms, and the court has taken care that the intereſt of the money ſhall be paid to the creditors under the commiſſion, during the

Ex parte GROOME.

life of the husband, and the principal secured to the wife, in case she survives her husband (1).

If judgment had been given at law by the husband for this sum, 'tis a debt notwithstanding the defeazance, and the trustees would have been admitted as creditors, though the terms of the bond itself be otherwise.

[118]

As to *Winchester*'s case, *where the father of the wife has given a bond to the husband to pay him the principal sum of* 1000 l. *after the death of himself and his wife, and interest at* 4 per cent. *by half yearly payments in the mean time.* Upon what terms shall the party be relieved against the penalty? Why upon paying what is in conscience due out of the estate.

Here was clearly a breach of the condition of this bond before the bankruptcy, for the half year's interest was become due at *Christmas*, but not paid till the 10th of *January*, and therefore, not being paid at the day, the penalty was forfeited at law.

It has been said, it turns upon the act for the amendment of the law the 4th and 5th of *Q. Anne*, *cap.* 16. *sec.* 12, "That when "an action of debt is brought upon any bond, which hath a con- "dition or defeazance to make void the same upon payment of a "lesser sum, *at a day or place certain*, if the obligor, his heirs, execu- "tors, or administrators, have before the action brought paid the "principal and interest due, though such payment was not made "strictly according to the condition or defeazance, yet it may be "pleaded in bar, and shall be as effectual as if the money had been "paid at the day and place according to the condition, and had "been so pleaded."

Before this act of parliament, the bond was forfeited if not paid at the day. *At a day or place certain*, are material words: This is a new defence, and a new plea given by the act of parliament; and therefore the common way of pleading is, that all interest was paid before action brought.

But this is not a bond with a defeazance for the payment of a lesser sum at a day certain, for here the principal is to be paid at an uncertain time; for it is to be paid within a twelvemonth after the death of the survivor of father and mother. It is not therefore a bond within the description of the statute, nor did the act of parliament intend to comprehend bonds of this nature.

A bond payable at installments, the obligee, upon breach of payment at the first installments, gets judgment on the whole penalty; on payment of the money due and costs, eve a court of law will relieve the obligor.

For suppose a bond payable at installments, the obligee gets judgment on the whole penalty, upon a breach of payment at the first installment; why, even a court of law would in such case act equitably, for upon the obligor's applying to the court there, and offering to pay the money due at the installment, and agreeing to let the judgment stand as a security for the rest, they will relieve the party, on payment of the money then due and costs.

If this case is not within the act of parliament, then it comes within the construction of the other two heads of cases, and Mr. *Winchester* ought to be admitted a creditor.

On the 4th set of cases, which is *Groome*'s, I am of opinion (though I am sorry I must go on such niceties) that he cannot be

(1) *Ex parte Smith*, 1 *Cooke's B. Laws*, 257. *Ex parte Brown*, *ibid.* 261. *Ex parte Mayford*, 1 *Bro. Cha. Ca.* 398.

admitted

admitted a creditor; in all the other cafes there was a remedy at law before fuch time as the act of bankruptcy was committed, or commiffion taken out, but here there was not. *Ex parte* GROOME.

As to the cafe that has been mentioned, *ex parte Cafwell, &c.* 'tis barely an opinion of Lord *King*, and not the cafe in judgment; but he did *obiter* declare his opinion only. My *Lord *Talbot* afterwards doubted of Lord *King*'s opinion; and in a cafe before me fince, I have differed from him intirely, and fee no occafion to alter my opinion.

The cafe *ex parte Cafwell, &c.* was an *obiter* opinion of Lord King's only and not the cafe in judgment.

[*119]

The queftion turns on the new act of parliament of the 5th of *George* the Second, *cap.* 30. *fec.* 7. I think that the privilege of creditors to come in, and bankrupts to be difcharged from debts, is co-extenfive and commenfurate, and very equitable: for it would otherwife make an inequality among the creditors, for a creditor, whofe debt was due before the taking out of the commiffion, fhall perhaps have no more than 5 *s.* in the pound, and this creditor, whofe debt was not due till a fecond diftribution, fhall come in for as much as the other creditor, and likewife have a remedy open to him for the reft againft the bankrupt.

For the words of the 5th of *George* the Second are, And every fuch bankrupt fhall be difcharged from fuch debts *as fhall be due and owing* at the time of the bankruptcy; fo that this would be a glaring injuftice againft the creditors at the time of the commiffion taken out.

Commiffioners very rightly declare a man a bankrupt only before iffuing the commiffion, without fpecifying any precife time.

The claufe relating to mutual credit, *fec.* 28. fhews plainly the act intended to confine it to creditors at the time of the commiffion, "That where it fhall appear to the commiffioners that "there hath been mutual credit given by the bankrupt and any "other perfon, or mutual debts between the bankrupt and any "other perfon, *at any time before fuch perfon became bankrupt*, the "commiffioners, *&c.* fhall ftate the account between them, *&c.*"

I will put this cafe: Suppofe a debt due from Mr. *Groome* to the bankrupt before his bankruptcy, and that the bankrupt owed him a debt on bond upon a contingency that took place after the bankruptcy, and before the final dividend, would it not be a great hardfhip upon the reft that fuch creditor fhould be at liberty to fet off?

A. a debtor to bankrupt before his bankruptcy, and creditor to him upon a contingency, that takes place after the bankruptcy, fhall not be at liberty to fet off under the claufe relating to mutual credit.

To go a ftep further. By the ftatute of the 7th of *George* the Firft, *cap.* 31. it is enacted as follows, that "All and every per"fon or perfons, who now are or fhall become bankrupts, fhall "be difcharged of and from all and every fuch bond, note, *&c.* "and fhall have the benefit of the ftatutes now in force againft "bankrupts in like manner to all intents and purpofes, as if fuch "fum of money had been due and payable before the time of his "becoming bankrupt."

In *Tully* v. *Sparks*, *Lord Raymond*, 2d *vol.* 1546, there were two contingencies, and as both had not happened at the time of the act of bankruptcy, it being uncertain whether the bond would ever become due or not, it was impoffible to make fuch abatement

Ex parte GROOME.

ment of 5 *per cent.* as the act directs, and therefore the court of King's Bench were of opinion the bond was not within the act of the 7th of *George* the First.

There is no such thing as drawing a line between the contingency not happening before the bankruptcy, and yet happening before the time of distribution: this would not only be a hardship on the bankrupt, and on the rest of the creditors whose debts were actually due, but would have given the contingent creditor a superior privilege, by leaving it open to him to recover the remainder of the debt against the bankrupt.

The case of *Groome* may have hardships, and I am sorry for it; but, as the law now stands, I cannot determine otherwise. I hope however, as I said before, some Gentleman will think of a clause by way of amendment to this last bankrupt act, which may remedy an evil of this kind for the future.

The petition of *Groome* was dismissed (1).

And with regard to Mr. *Winchester*, his Lordship ordered *that the petitioner be at liberty to prove his debt of* 1000 l. *and that he be admitted a creditor under the commission for what he shall so prove, and be paid out of the bankrupt's estate a dividend in respect thereof, rateably with the other creditors of the bankrupt.*

(1) *Ex parte Michell,* next case. *Ex parte Cork,* 7 *Vin.* 72. *pl.* 7. *Ex parte King,* *Davies* 254. 1 *Cooke's B. Laws,* 277.

December the 23d, 1751.

Ex parte Elizabeth Michell.

Case 66.

3 *Wils.* 271. S. C.

B. M. in pursuance of articles before marriage with the petitioner, executed a bond to *T. M.* and *W. R.* trustees under the articles, in the penalty of 1000*l.* conditioned to be void if the heirs, &c. of *B. M.* should pay to *T. M.* and *W. R.* 500*l.* within three months next after the death of *B. M.* for the use of the petitioner; or in case she should not survive, to the use of her child or children, if any.

BENJAMIN MICHELL, in pursuance of articles before his marriage with petitioner, did, on the 27th of *January* in the 12th year of the late King, execute a bond to *Thomas Michell* and *William Rous*, the trustees under the articles in the penalty of 1000*l.* conditioned to be void if the heirs, &c. of *Benj. Michell* should pay to *Thomas Michell* and *William Rous* 500*l.* within three months next after the death of *Benjamin Michell* for the use of the petitioner, in case she should outlive her husband, or in case she should not survive him, to the use of her child or children, if any.

A commission of bankruptcy issues against *B. M.* who dies on the first of *April,* 1749: on the 28th of the same month a dividend is made of 9 *s.* in the pound.

A commission of bankruptcy issued against *Benjamin Michell*, who lived some time after, and died on the first of *April* 1749. On the 28th of *April* 1749, a dividend of nine shillings in the pound was directed to be made of *Michell*'s estate.

The commissioners would not admit the petitioner a creditor without an order of the court.

She

She petitioned to be admitted a creditor, and to be paid out of the money remaining in assignees' hands, a dividend, in proportion to what hath been already paid to other creditors.

Lord Chancellor mentioned the case *ex parte Caswell, &c.* 2 *P. Wms.* 497. *a.* 499. where Lord chancellor *King* upon such a contingent debt directed, as husband died before a dividend, the wife to be admitted to prove it; and the case *ex parte Greenaway* (1) before himself, where on his ordering it to stand over to give assignees and creditors an oportunity of compromising it with the wife, they admitted her a creditor for 150*l.* half her demand.

Ex parte MICHELL.

The peitioner prays to be paid a proportionable dividend.

[121]

The assignees being served here with notice, and no counsel attending for them, his Lordship directed she should be admitted a creditor, and to a dividend of nine shillings, *not being opposed.*

Assignees being served with notice, and no counsel attending for them, directed she should be admitted a creditor, and receive a dividend of 9*s.* in the pound, *not being opposed.*

His Lordship declared, that if there had been a judgment, he should have thought this would have made it an immediate debt (2) and she would have been intitled to come in as a claimant before the death of the husband, and assignees must then have retained sufficient in their hands on a dividend day, to answer a proportionable dividend to the petitioner when the event happened, in the same manner as in the case of obligees *in respondentia*, or bottomry bond, or persons on policies of insurance, under an act of parliament of the 19th of *George* the Second, where it cannot be known whether a loss has happened or not.

If there had been a judgment, it would have made it an immediate debt, and she would have been intitled to have come in as a claimant before her husband's death and the assignees must then have retained sufficient on a dividend day, to answer a proportionable dividend to the petitioner when the event happened.

(1) *Ante* 113. (2) See *Ex parte Winchester ante* 117.

January the 22d. 1752.

Lord Chancellor had some doubt after he had pronounced the order last day of petitions, and therefore would not suffer the secretary to draw up the order, though not defended.

Upon a search at the bankrupt office, there was found the case *ex parte Greenaway*, (1) and the four cases which came on together upon contingencies, by the order of Lord *Hardwicke* who said that Lord *King*'s was an *obiter* opinion as to a wife's being admitted to a dividend; that Lord *Talbot* doubted of it, and that he himself also doubted of it; and in a case *ex parte Groome*, (2) in *December* 1741, was of opinion the creditor could not be admitted, and founded his opinion on *Tully vers. Sparks* in the court of King's Bench; and therefore in this case of *Michell* he declared that he was very unwilling to make a precedent, though this appeared to be a very hard case. The only difference between *Groome* and this, is that *Groome*'s case was upon contract,

Lord Chancellor *King*'s being an *obiter* opinion as to a wife's being admitted to a dividend, and Lord *Talbot* doubting of it, and Lord *Hardwicke*, in a case *ex parte Groome December* 1741, refusing to admit such a person creditor, his Lordship would not suffer the secretary to draw up the order pronounced at a former day of petitions, tho' not defended, but recommended it to the assignees to compromise it with the petitioner.

(*a*) *Ante* 113. (2) *Ante* 115.

2 but

Ex parte MICHELL.

but this upon bond; and unless you can make it *debitum in præsenti solvendum in futuro*, which will be difficult to do, the petitioner will not be intitled to prove it. In those cases where he had let in such creditors, a judgment was given at the time, which is an immediate debt at law, and suspended only in equity upon the defeazance. His Lordship ordered it to stand over till next day of petitions, and in the mean time recommended it to the assignees to compromise with the petitioner (1).

(1) See 3 *Wilf.* 271.

[122]

(K) *Rule as to Drawers and Indorsers of Bills of Exchange.*

December the 23d, 1743.

Ex parte Walton and others; in the Matter of *William Winsmore*, a Bankrupt.

Case 67.

W. draws bills of exchange on *H.* who had no effects of *W.* in his hands, they are transmitted to *R.* and Co. and indorsed over by them to several persons; the assignees of *R.* and Co. must be admitted as creditors under *W.*'s commission for so much as they have paid to to the indorsees of *W.*'s bills of exchange, under *R.* and Co.'s commission.

Aaron Richardson and *Edward Stephens*, on the 25th of *June* 1740, entered into co-partnership, which was to be carried on in *London*, in the names of *Richardson and Company*; and it was also agreed, that *Stephens* should be at liberty to carry on a separate trade at *Bristol*, on his own account, and for his own benefit.

On the 16th of *March* 1740, a joint commission of bankruptcy issued against *Aaron Richardson* and *Edward Stephens*, and the petitioners were chosen assignees.

In *December* and *January*, 1740, *William Winsmore* drew several bills of exchange on *Richardson* and company, payable to *Harper* or order, for different sums, amounting to 2500 *l.* which bills were accepted by *Richardson* and company for *Winsmore*'s sole account, on his undertaking to send them money or effects, to pay and satisfy these bills before they fell due; but he did not keep his promise.

Winsmore, in *January* and *February* 1740, drew several other bills of exchange on *Harris* (who was his agent in *London*), some of which were payable to *Harper*, and others to *Edward Stephens* or order, for different sums, amounting to 2060 *l.* which last bills were remitted to *Richardson* and company by *Stephens* on his own private account, in order to enable them to discharge bills of exchange, which *Stephens* had, on his separate account, in order to serve *Winsmore*, drawn on *Richardson* and company, and *Richardson* and company negotiated the said bills as *Stephens* directed; and several of them, to the amount of 1565 *l.* being drawn by *Winsmore* on *Harris*, *Richardson* and company indorsed the same, not doubting but *Winsmore* or *Harris* would have taken care the same were punctually paid when they fell due, but, instead thereof, *Winsmore* stopped payment, and never remitted *Richardson* and company any money or effects to pay the said bills, or any of them.

On the 29th of *April* 1742, before any dividend was made of *Winsmore*'s estate, the petitioners, as assignees of *Richardson* and company,

company, exhibited their claim under his commission for 2500*l.* the amount of the bills accepted, and for 475 *l.* part of the bills which had been indorsed by them the said *Richardson* and company for account of *Winsmore*, which were all the bills that had been proved under the commission against *Richardson* and company; and the commissioners admitted the claim under the commission against *Winsmore*. *Ex parte* WALTON.

A dividend of two shillings and nine-pence in the pound was afterwards ordered to be made to *Winsmore's* creditors who had proved their debts, and also a reservation to answer a like dividend [123] on the petitioner's claim, when they should make the same.

On the 29th day of *July* 1742, a dividend of five shillings in the pound was made among the creditors of *Richardson* and company, and the petitioners had paid the dividend of five shillings to great part of the bearers of the said bills, and were ready to pay the same to the rest, after a deduction out of their debts to the amount of the two shillings and nine pence in the pound, divided under *Winsmore's* commission. The dividend of five shillings in the pound, in the bankruptcy of *Richardson* and company, on the said bills, amounted to 744*l.* and therefore the petitioners the assignees of that commission pray, that they may be admitted creditors under the commission against *Winsmore*, for the sum of 744*l.* the amount of the dividend of five shillings in the pound, and for all such future sums as should be paid out of the estate of *Richardson* and company, in respect of the said bills, and likewise for all such other bills drawn by *Winsmore*, or by his order and direction, and accepted and indorsed by *Richardson* and company, without consideration or value, which should hereafter be proved under the commission against them, and that the assignees of *Winsmore's* estate might be ordered to pay the petitioners the said dividend of two shillings and nine pence in the pound, and all future dividends rateably with the other creditors, for the sums before mentioned for the benefit of the petitioners, and the rest of the creditors of *Richardson* and company.

Lord Chancellor: The question is, Whether the assignees of *Richardson* and company, the indorsors of these bills of exchange, are intitled to come in under *Winsmore's* commission, for so much as the indorsees of *Richardson* and company have received under the commission against *Richardson* and company.

Winsmore swears that in *January* and *February* 1740, he drew several bills of exchange on *Harris* his agent in *London*, amounting to 2060 *l.* or thereabouts, which bills were transmitted by *Stephens* on his own private account to *Richardson* and company, and indorsed over by them to several persons.

The doubt with me was, whether *Harris* had any effects of *Winsmore's* in his hands, for if he had, there would have been no pretence that the indorsors should come in against *Winsmore's* estate.

In bills of exchange, there is a double contract, the first between the principal debtor and creditor, and also an implied contract, that the principal debtor will indemnify the surety, so that if the creditor the indorsee comes upon the surety the indorsor, the indorsor

Ex parte WALTON

dorsor or his assignees may come in against the original or principal debtor.

Thus it stands between principal and surety, and is likewise the case, where an indorsor is barely a surety, and no consideration is paid by the original drawer.

[124]

A. draws a bill on *B.* who has effects of *A.*'s in his hands, afterwards it is negotiated and indorsed over; this will not make the indorsors only in the nature of sureties to *A.* but every indorsor will be considered a new original drawer.

But put another case; *A.* draws a bill upon *B.* who has effects of *A.*'s in his hands, afterwards his bill is negotiated and indorsed over; there is do suretyship in this case, for *A.* did not draw it upon *B.* as a surety, but as having effects of *A.* in his hands, by which he was obliged to answer the draft of *A.* and therefore the indorsing it over to others will not make the indorsor only in the nature of sureties to *A.* but every indorsor will be considered as a new original dawer.

But here *Harris* appears to have had no effects of *Winsmore*'s in his hands, and therefore accepted it merely to give credit to *Winsmore as a surety*, and consequently the assignees of *Richardson* and company must be admitted as creditors under *Winsmore*'s commission for so much as they have paid under *Richardson*'s commission to the indorsees of *Winsmore*'s bills of exchange.

His Lordship therefore ordered, that the petitioners the assignees of *Richardson* and company be admitted to come in as creditors under *Winsmore*'s commission for 744*l.* and that they be paid a dividend out of his estate in respect thereof rateably with the other creditors, and that in all future dividends the petitioners be paid in respect of the said sum of 744*l.* rateably in equal proportion with the other creditors of *Winsmore* seeking relief under that commission, in trust for themselves and the several other joint creditors of *Richardson* and company.

November the 4th 1743.

Case 68.

Ex parte Byas.

D. being indebted to *M. K.* in 71*l.* gave him the following note: *I promise to pay to* M. K. *the sum of* 71l. *witness my hand,* Aug. 28th, 1734. *E. D.* *M. K.* being indebted to petitioner in 92*l.* 19*s.* 0*d.* delivers *E. D.*'s note to him that he might receive the money in part of his debt, and took the following receipt, *Received* 20 Dec. 1734, *a bill for* 71l. *which when paid will be on account per* Thomas Byas. *M. K.* becomes a bankrupt, but not having indorsed or assigned the note to petitioner, the assignees apply to *D*'s solicitor and receive of him the 71*l.*

The assignees of *K*'s estate ought to be considered as trustees for the petitioner with respect to the sum of 71*l.* and ordered to pay him the money accordingly (1).

MRS. *Devereux* being indebted to *Martin Kankell* in 71*l.* for goods sold on the 28th of *August* 1734, gave him the following note: *I promise to pay to* Martin Kankell *at queen* Caroline's *head in* Tavistock-street Covent Garden, *the sum of seventy-one pounds, witness my hand,* August 28th 1734. *E. Devereux.*

Martin Kankell being indebted to the petitioner in 92*l.* 19*s.* delivered to him Mrs. *Devereux*'s note, that the petitioner might receive the money due thereon in part of his debt, and took of the petitioner a receipt for the same in the words following: *Received* 20th of Dec. 1734, *a bill for* 71*l.* *which when paid will be on account per* Thomas Byas.

(1) *Vide Tyrrel* v. *Hope, post.* 2 *vol.* 558. *Winch* v. *Keely,* 1 *Durn. and East*'s *Rep.* 619.

The

The 19th of *March* 1734, a commission of bankruptcy issued against *Martin Kankell*, Mrs. *Devereux* died in 1735, and by her will charged all her estate real and personal with the payment of her debts. *Ex parte* BYAL.

Kankell not having indorsed or assigned the said note to the petitioner, the assignees applied to Mrs. *Devereux*'s solicitor, and received the 71 *l.* of him on giving security to indemnify him against the petitioner's claim, who had the note in his custody and possession.

The petitioner proved his whole debt of 92 *l.* 19 *s.* under *Kankell*'s commission, but at the same time insisted on having the benefit of the note, and that the assignees ought not to have received the 71 *l.* and that the same having been so received by them in prejudice to the petitioner, ought to be paid over to him, and therefore prays that the assignees of *Kankell*'s estate may, out of the money now in their hands, pay to the petitioner the 71 *l.* which they received for the money due on Mrs. *Devereux*'s note.

Lord Chancellor : I am of opinion that the assignees of *Kankell*'s estate under the commission, ought to be considered as trustees for the petitioner, with respect to the sum of 71 *l.* which they received on account of the note given by Mrs. *Devereux* in the petition, and do order the assignees to pay forthwith the 71 *l.* to the petitioner according to the prayer of his petition.

Ex parte Kirk. October the 26th, 1745.

Vide under the Division, Rule as to Creditors:

Ex parte Thompson. *June* the 4th, 1746.

Case 69.

A. gives a note payable to *B.* two months from the date for 100 *l.* *B.* indorses it over to *C.* but allows a discount of 9 *per cent.* he proves it under a commission against *A.* for the whole sum, but commissioners finding out this fact afterwards, stopt his dividend.

A. Gives a note of his hand payable to *B.* two months from the date for 100 *l.* who gave no consideration. *B.* [indorses] it over to the petitioner, but allows a discount of a guinea and a half, being at the rate of 9 *l. per cent.* when the note became due, the petitioner takes a joint bond from the drawer and indorsor for the 100 *l.* though he paid only 98 *l.* 8 *s.* 6 *d.* the commissioners had admitted him as a creditor under a commission against the drawer, but finding out this fact afterwards, they ordered his dividend to be stopped.

He now petitions *Lord Chancellor* to be admitted to his share of the dividend. [126]

Lord Chancellor would not direct him to be admitted to the dividend, but ordered an issue to try whether the bond was usurious before Lord Chief Justice *Willes* (1).

Lord Chancellor rejected his petition and ordered an issue to try whether the bond was usurious.

(1) See *Ex parte Skip*, 2 *Vef.* 489. *Lowe* v. *Waller*, *Dougl.* 708.

November the 4th, 1747.

Case 70.

S. C. ante 73.

A note given before an act of bankruptcy, tho' indorsed after, is a debt upon which the indorsee may take out a commission of bankruptcy against the drawer.

Ex parte Thomas.

THE bankrupt petitioned to supersede the commission against himself, because the petitioning creditor's debt arose only from a note that had been indorsed to him after the petitioner had committed an act of bankruptcy; but as it appeared, that the note itself was given before any act of bankruptcy, though indorsed after, *Lord Chancellor* thought it a debt upon which the petitioning creditor might take out the commission (1).

(1) *Anon.* 2 *Wilf.* 135. *Bingley* v. *Maddison*, 1 *Cooke's B. Laws* 22.

November the 25th, 1749.

Case 71.

1 Vez. 327. pl. 161. S. C.

The plaintiff and one *Michell* had various transactions together, principally negotiating bills of exchange from 1742, to the 8th of *June* 1743, and on the 18th of *April* 1743, *Michell* committed a private act of bankruptcy; the sums paid by *Michell* for these transactions to the plaintiff amounted to 3000*l*.

Billon v. *Hyde* and *Michell*.

LORD Chancellor: This bill is to have an allowance for 712*l*. out of a sum of 3000*l*. which has been recovered in an action at law, by the defendants the assignees of *Michell* the bankrupt against the plaintiff.

The case is, That Mr. *Michell*, who was a merchant, had long dealings with the plaintiff before the 18th *April*, 1743, when he committed an act of bankruptcy, which the plaintiff insisted was a private act of bankruptcy, and that for some time after Mr. *Michell* appeared in publick in all places where merchants resort, without suspicion of his being a bankrupt.

The dealings between Mr. *Michell* and the plaintiff, as it appears in the cause, commenced in 1742, and continued after the 18th of *April* 1743, up to the 8th of *June* following, and the commission of bankruptcy was dated the 30th of *November*, 1743.

The transactions between them from the 18th of *April*, 1743, to the 8th of *June* following were of various sorts, but appear to be fair ones, and were principally in negociating bills of exchange upon which the plaintiff advanced to Mr. *Michell* money to a considerable amount.

Several sums were also paid by the plaintiff to Mr. *Michell* during this space of time; some paid to Mr. *Michell*'s own hand, some to his order, some by way of loan, and other sums by way of money laid out for his use, for præmiums on insurances for his benefit, and for duties on goods imported by him, which sums amounted to 712*l*.

It appeared that the sums of money paid at different times by Mr. *Michell* to the plaintiff for and on account of these several transactions, amounted in the whole to 3000*l*.

[127]

The assignees bring an action against *Billon* for so much had and received to their use, and recovered a verdict against him for 3000*l*.

The assignees under the commission finding these sums were paid by Mr. *Michell* after the act of bankruptcy committed by him,

him, they brought their action againſt the plaintiff for ſuch money had and received to their uſe, and recovered a verdict againſt him for that money.

Billon v. Hyde.

Mr. *Billon*, the plaintiff here, but defendant at law, inſiſted on the trial to have the ſum of 712*l.* allowed him as paid to and for the bankrupt, and it not being allowed, is the reaſon of his bringing this bill.

Billon inſiſted on the trial to have 712*l.* allowed him as paid to and for the bankrupt, but being refuſed, brings his preſent bill for it. The plaintiff intitled to have this allowance, and the verdict not concluſive upon him, becauſe it is matter of contract, and of account, and therefore a proper ſubject for the juriſdiction of this court.

There are two conſiderations.

Firſt, Whether the plaintiff is intitled to this allowance?

Secondly, If he is intitled, whether he has purſued a proper remedy, or whether this court is concluded by the verdict?

And theſe queſtions muſt depend upon the nature of the demand of the aſſignees againſt him, and the nature of the remedy he has purſued.

As to the nature of the demand of the aſſignees, which is founded upon *the relation* of the act of bankruptcy, it is as hard a caſe as any in the law, as this *relation* may go a great way back, and over-reach all tranſactions without regard to their being fair or fraudulent.

It holds in ſales of goods, and payment of money, and it overturns not only contracts, but acts upon record, and legal acts, as judgments and executions executed; where theſe acts happen after the act of bankruptcy committed.

It is ſaid fictions of law ſhall not enure to the prejudice of any body, but are invented to ſupport rights, and to be ſure that is the rule; but this caſe is taken out of another general rule, which has been adhered to for the ſake of publick utility; *viz.* that it is better a private miſchief ſhould inſue, than a general inconvenience: *Lex citius vult tolerare privatum damnum, quam publicum malum.* 1 Inſt. 152. b.

But ſince trade has increaſed, the miſchiefs and inconveniencies have multiplied, and therefore the late act of the 19 *Geo.* 2. was made; and this caſe is within the recital of that act, and one of the principal caſes provided for by it, is the negotiation of bills of exchange.

And though the plaintiff may not bring himſelf ſtrictly within the act, yet he is within the meaning of it, and the court will go as far as it can in ſupport of it.

Secondly, As to the remedy purſued by the plaintiff.

It is inſiſted by the aſſignees, he ought not to have a remedy here againſt them, for that they recovered at law by their own ſtrength; and, as he failed there, he ought not to be aſſiſted here: but it does not appear in what ſhape the ſet-off was offered at the trial, and I am apt to believe it was only offered in mitigation of damages.

I think, from the nature of the demand againſt him, he is intitled to have this allowance in ſome ſhape or other.

It appears new to me, to permit aſſignees to maintain an action of *indebitatus aſſumpſit* for money paid by a bankrupt to another perſon after a ſecret act of bankruptcy: I always thought aſſignees were obliged to bring an action of *tort*, either trover,

Billon v. Hyde.

or trespass, and the Lord Chief Justice *Holt*, *Parker*, and *Raymond* were of that opinion (1).

I remember Lord Chief Justice *Parker* declared in a cause at *Guildhall*, the 4 *Geo.* 1. that he knew no case where a man might not maintain an *assumpsit* for money wrongfully taken from him, except two, *viz.* for money won at play, and for money paid by a bankrupt *bona fide* to a creditor after an act of bankruptcy committed. And in cases where trover has been brought by assignees under a commission of bankruptcy, the courts have lean'd against a strict construction of the bankrupt acts, to the prejudice of a fair creditor. *Vide* 3 *Lev.* 58. 59, *Rider* v. *Fowl* on a special verdict.

To raise an *assumpsit*, the assignees must maintain either in fact or by *relation* a contract, and here the contract upon which the *assumpsit* is maintained, is by the interposition of the bankrupt; and therefore I think he ought to be considered as the factor of the assignees; and if they will take this method, and affirm the contract done by the bankrupt, they must take him as their factor in all acts done fairly and without deceit. *Wilson* v. *Boulter*. *Raym.*

Upon the authority of that case, I think this a favourable action for the plaintiff to have such allowance, because it makes the assignees affirm the contract of the bankrupt, and am of opinion, that the verdict at law, which has not allowed it, is not conclusive upon the plaintiff, because it is a matter of contract and of account, and consequently a proper subject for the jurisdiction of this court, and the plaintiff ought to be allowed, by the interposition of this court, so much as in justice he ought to have; and I recommend it to the assignees to allow the sum of 712 *l.* to the plaintiff (2).

(1) But the assignees may now bring an action of *assumpsit* or *tort*, but not *both*. *Kitchen* v. *Campbell*, 3 *Wils.* 304. 2 *Black.* 830. *Hussey* v. *Fidell*, 12 *Mod.* 324. *Holt* 95. S. C. *Phillips* v. *Thompson* 3 *Lev.* 191.

(2) His Lordship adjourned the cause in order that the parties might come to an accomodation; upon which *Hanbury* (the surviving assignee) with the consent of all the creditors entered into an agreement with *Billon*, who was thereby allowed to deduct the whole of the 712 *l.* 2 *s.* out of the monies recovered under the verdict. In pursuance of this agreement his Lordship with the consent of the parties, ordered, that *Hanbury* should allow *Billon* the 712 *l.* 2 *s.* and dismissed the plaintiff's bill. *Reg. Lib. A.* 1749. *f.* 227. See *Ex parte Ockenden*, *post.* 237. *Ryall* v. *Rolles*, 1 *Vez.* 375. *post.* 185.

February the 24th, 1752.

Richardson and *Gibbons*, Assignees of *Alexander Wilson* a Bankrupt, — — Plaintiffs.

Bradshaw, *Taylor*, and *Wilson* — — Defendants.

Case 72.

Drawing and redrawing bills of exchange for large sums, and a continuation of it is trafficking in exchange, and a trading which will make a man liable to a commission of bankrupt, though a loss ensues to the bankrupt by so doing.

A Trial in the court of King's Bench before a special jury for the county of *Middlesex*, upon the following issues out of the court of chancery, directed by Lord *Hardwicke*.

ft, If

1st, If *Wilson* was a trader or a banker within the meaning of the acts of parliament relating to bankrupts. RICHARDSON v. BRADSHAW.

2dly, If he had committed any act of bankruptcy within the said statutes.

With regard to the first it was proved, that *Wilson*, who was agent to several regiments from the year 1745 to 1751, drew upon capt. *Johnson*, who was likewise an agent in *Dublin*, by bills to the amount of 281,000*l.* and upwards, and that *Johnson* redrew to the amount of 290,000*l.* and upwards, on *Wilson*, [129] but there was no commission money allowed to either side.

It was proved in the cause by Mr. *Porter*, Mr. *Linch*, Mr. *Mathias*, Mr. *Tessier*, and others, considerable merchants in the city of *London*, that drawing and redrawing bills of exchange, for such large sums, and a continuation of it, is a trafficking in exchange, and a trading, which in their apprehension would make a man liable to a commission of bankruptcy, though no commission money had been allowed on either side, and notwithstanding a loss ensued by these transactions to the bankrupt.

The evidence of Mr. *Wilson*'s being a banker, was, that he kept a clerk who was in the nature of a cashier, to receive and pay money, and that for several years together, officers and their widows, and other persons, not belonging to regiments, paid money into *Wilson*'s hands, and the cashier gave accountable notes for the same, and these persons drew from time to time upon *Wilson* for such sums, payable either to bearer or order, as they thought proper, but the books were not kept in the same manner as bankers do, and it appeared in proof, that if *Wilson* received any large sum, he paid it into the shop of his own bankers, Messrs. *Drummonds*, and from the year 1740, to 1751, paid 30,000*l.* a month into the said shop, and that he only had in cash by him about 3 or 400*l.* to answer any small drafts; but that for large ones he gave the persons drafts upon Messrs. *Drummonds*.

The jury before they delivered their verdict asked Lord Chief Justice *Lee*, whether such drawing and redrawing as aforesaid, was in point of law a trading?

Lord Chief Justice *Lee* said, it was not so much a point of law, as a fact to be determined by them on the usage and opinion of merchants, and that if they paid any credit to the merchants who had been examined, and were men of character, this was a trading; accordingly a verdict was given for the plaintiffs. The jury on the first issue finding *Wilson* a trader generally within the bankrupt acts: and on the second issue finding him a bankrupt within the said acts (1).

(1) See the distinction between this case and that of *Hankey* v. *Jones*, *Cowp.* 745. and the comments of *Lord Mansfield* upon the answer of the Chief Justice *Lee* to the question put by the jury in the former case.

December the 21st 1752.

Part of S. C. post 131. 262.

Ex parte Marshal and others.

Case 73.

G. drew a great number of bills payable to V. and A. upon H. who had no effects of G.'s in his hands, but accepted them for the honour of the drawer. G. becomes a bankrupt, and H. by means of the great sums he paid on account of such acceptance, becomes bankrupt likewise.

The bill holders prove under both commissions, and receive dividends, but not sufficient to pay 20*s.* in the pound.

The assignees of H. pray to stand in the place of the bill-holders *pro tanto*, as they had received under H.'s commission against the estate of *Garway*.

MR. *Garway* of *Worcester* drew a great number of bills, payable to *Vere* and *Asgill*, upon *Hatton*, who had no effects of *Garway*'s in his hands, but however accepted the bills for the honour of the drawer.

* *Garway* becomes a bankrupt, and *Hatton*, by means of the great sums he paid on account of such acceptance as before mentioned, becomes a bankrupt likewise.

[*130] The bill-holders prove under both commissions, and receive dividends, but not sufficient to pay 20*s.* in the pound: and in *April* last upon a former day of petitions, *Marshal*, &c. the assignees of *Hatton* preferred a petition to *Lord Chancellor*, and prayed to stand in the place of the bill-holders *pro tanto*, as they had received under *Hatton*'s commission against the estate of *Garway*; *Hatton*, as was insisted by the petitioner's counsel, being to be considered as a surety for the debt, and *Garway* a principal; and *Lord Chancellor* at the former hearing made an order accordingly; but it being strongly objected by the counsel for *Garway*'s creditors, that this would be charging *Garway*'s estate doubly, directed the petition to stand over; and on its coming on again this day, his lordship ordered, that the petitioners, as assignees of *Hatton*, should stand in the place of the bill-holders *pro tanto*, as *Hatton*'s estate had paid on account of his acceptance of the said bills, but should not be intitled to any dividend from *Garway*'s estate, till the bill-holders had received a full satisfaction for their debts; and if the surplus of *Garway*'s estate, after the bill-holders were fully satisfied, should not be sufficient to answer what *Hatton* had paid as the acceptor of *Garway*'s bills, then his Lordship declared that nothing in this order should prejudice any right the petitioners might have by action against the person of *Garway* for the residue of their demand, *notwithstanding* Garway *has had his certificate*; for his Lordship said, it seemed to him, as if *Hatton*'s demand did not properly arise till after the issuing of the commission against *Garway*; because, though there is an implied contract between drawer and acceptor, yet there is no breach on the part of drawer till after his bankruptcy, and consequently *Hatton* is not a creditor under the commission, because his debt is subsequent to it; nor does he fall under the description of persons in the 7 *Geo.* 1. who may sue out commissions, though their debts are payable at a future day. There *debitum in presenti solvendum*

His Lordship ordered they should be admitted *pro tanto*, as H.'s estate had paid on account of his acceptance of the said bills, but not to receive any dividend from G.'s estate, till the *bill-holders* had received a full satisfaction for their debts.

in

in futuro, but here it was *contingent* whether it would ever be a debt, as *Garway* might not have failed (1). *Ex parte* MARSHAL.

The counsel for the petitioners mentioned the case *ex parte Walton* (*a*), Dec. 23d, 1743, in the matter of *Winsmore's* bankruptcy, where, as he stated it, *Lord Chancellor* made an order, that the assignees under the commission against the acceptor, should come under the commission against *Winsmore* the drawer *pro tanto*, as the acceptor had paid on account of such bills, and to receive a dividend rateably with the rest of the creditors. (*a*) *Ante* 122.

Lord Chancellor said, that the order alluded to in *Winsmore's* bankruptcy was not as stated, nor was it applicable to this case, but that supposing the two cases to be something similar, he thought the directions he had now given under the present petition, were the justice of the case; and therefore had ordered accordingly. [131]

(1) See *Ex parte Ryswick*, 2 *P. W.* 89. *Kettier* v. *Raynes*, 1 *Cooke's B. Laws* 250.

Ex parte Marshal and others: In the Matter of *Hatton* a Bankrupt.

June the 21st, 1753.

Vide preceding Case.

[illegible] 71.

Watkin of *Bristol* had large dealings with *G.* of *Worcester*, who had *Hatton*, now a bankrupt, for his correspondent in *London*. It was agreed between *G.* and *Hatton* that the latter should answer all drafts that *Watkin* should draw upon him on account of *G.* *Watkin* draws accordingly upon *Hatton* for 400 *l.* who accepts it, *though he had no effects of G.'s in his hands*; the payee, on the acceptor's non-payment, applies to the drawer who pays it. *Watkin* applies to be admitted a creditor upon the commission against *Hatton*.

WATKIN a merchant at *Bristol* had large dealings with Mr. alderman *Garway* of *Worcester*, who had *Hatton*, now a bankrupt, for his correspondent in *London*, and it was agreed between *Garway* and *Hatton*, that the latter should answer all drafts that *Watkin* should draw upon him on account of *Garway*; *Watkin* draws accordingly on *Hatton* for 400 *l.* who accepts it, tho' he had no effects of *Garway's* in his hands at the time: the payee of this draft, upon the acceptor's non-payment, applies to the drawer who pays it. *Watkin* applied to be admitted a creditor under the commission against *Hatton*, the acceptor of the drafts, and is admitted by the commissioners.

The assignees of *Hatton* petition now against this admission of *Watkin*, as *Hatton* had no effects of *Garway's* in his hands.

Lord Chancellor: I will consider it first as it stands between *Watkin* and *Hatton*: If payee receive the money comprized in the draft of *Watkin*, he may bring an action against *Hatton* in the name of the payee, who will be considered as a trustee for the drawer, or he may bring an action in his own name against *Hatton*, if he had effects of *Watkin* at the time of the acceptance sufficient to answer the draft; but if he had not effects, but only honoured the draft, such action cannot be maintained; or if in this case *Hatton* had paid it, instead of being a debtor to *Watkin*, he would have been indebted to *Hatton pro tanto*; and so it was determined in the House of Lords, a writ of error from the court of King's Bench.

The agreement between *Garway* and *Hatton* puts the latter to all intents in the same situation as *G.* himself, and therefore, *though he had no effects in his hands at the time*, he has by his agreement made himself liable, and *Watkin* has a right to come in as a creditor under the commission against *Hatton*.

But

Ex parte MARSHAL.

But consider it now as it stands between *Garway*, *Watkin* and *Hatton*: *Watkin* appears, at the time he drew on *Hatton*, to have had effects in *Garway*'s hands of more value than the amount of this draft, and as there was such an agreement as I have before mentioned between *Garway* and *Hatton*, the latter is to all intents and purposes just in the same situation as *Garway* himself; and therefore, though he had no effects in his hands at the time, has by his agreement made himself liable.

[132] The same rule will hold therefore under a commission of bankruptcy as in an action at law, and upon these circumstances, *Watkin* has a right to come in as a creditor under the commission against *Hatton*, and therefore the petition of the assignees must be dismissed.

(L) *Where Assignees will be charged with Interest.*

October the 22d, 1741.

Ex parte Lane.

Vide under the Division, Rule as to Assignees.

(M) *Rule as to Partnership.*

After *Hilary* term, 1736.

Beasly v. *Beasley*.

Vide under the Division, Joint and separate Commission.

August the 6th, 1740.

Ex parte Banks.

Vide under the Division, Rule as to Creditors.

March the 29th, 1743.

Ex parte Voguel and others.

Case 75.

A separate commission taken out against persons formerly partners, the joint creditors upon an application to the court are left at liberty, to bring their bill for any demand on account of the partnership against the assignees of the separate estate, who are directed to sell the whole effects, and deposit the money in the bank, but to make no dividend till the suit is determined: The joint creditors to prove their debts under the commission in the mean time without prejudice.

A Separate commission had been taken out against persons who were formerly partners; the petitioners being joint creditors pray by their petition, that the joint effects seized under the separate commission may be divided in the first place among the joint creditors.

The Attorney General, counsel for the petitioners, insisted they must have some way of securing the joint effects, that they may not be imbeziled by the creditors under the separate commission.

Lord Chancellor: I leave the petitioners at their liberty to bring a bill for relief for any demand in their petition, or any other demand

mand on account of the partnership, against the assignees of the separate estate, before the last day of next *Easter* term. *Ex parte* VOGUEL.

And I direct the assignees under the separate commission, to proceed to a sale of the whole effects seized under the commission, and to deposit the money arising from the same in the bank in the name of the assignees, but to make no dividend till the suit is determined; and in the mean time let the joint creditors be at liberty to come in under the separate commission, and prove their debts without prejudice (1).

(1) *Vide Ex parte Marlin*, 2 *Bro. Cha. Rep.* 15. *Ex parte Tate*, 1 *Cooke's B. Laws*, 298. *Ex parte Hayward*, *ibid.* 299. *Ex parte Burnaby*, *ibid.* 301.

Ex parte Crisp, in the Matter of his Bankruptcy. *August* the 2d, 1744.

Case 76.

A commission may issue against one partner of three for a joint debt though an action cannot be maintained against one, without joining the other two parties.

IN 1742, the petitioner, *Burnaby* and *Barbut*, became copartners, and were jointly concerned in erecting an amphitheatre at *Ranelagh*, and in making and laying out gardens for the entertainment of the public; and the copartnership was to continue upon the foot of the said undertaking for a certain term of years, yet subsisting, upon and under certain covenants, provisoes and agreements, contained in a certain deed or instrument duly executed by the petitioner, *Burnaby* and *Barbut*. The amphitheatre being erected, and the gardens laid out according to the scheme, the premisses were afterwards provided and furnished with all things useful and necessary to make the undertaking compleat, and on that account many large sums of money were laid out, and debts contracted with the different workmen and tradesmen.

Some difference afterwards arose between the petitioner *Burnaby*, and *Barbut*, who endeavoured to dispossess the petitioner of his estate and interest in the undertaking, and to get the management thereof wholly into their own hands; and in order thereto, a commission of bankruptcy, on the first of *Feb.* 1742, issued against the petitioner alone, upon the petition of *William Perritt*, whose debt had been contracted on account of the undertaking, and was due from the petitioner, *Burnaby* and *Barbut* jointly, and as partners, and not from the petitioner alone.

By an order made the 18th of *Feb.* 1742, upon a former petition, it was ordered that the commissioners should execute a provisional assignment of the petitioner's estate and effects, and that the parties should proceed to a trial at law in the court of Common Pleas, in an action of trover to be brought by the petitioner against the provisional assignee.

On the 9th of *June* 1743 (1), the action was tried before Lord Chief Justice *Willes*, when his Lordship declared that the peti-

(1) *Crisp* v. *Perrit*, 1 *Cooke's B. Laws*, 18. S. C.

Ex parte CRISP.

tioner had committed an act of bankruptcy; but it appearing that the debt upon which the commission was taken out was due from the partnership, his Lordship doubted whether the commission issued regularly, and directed a verdict to be found for the petitioner, [134] subject to the opinion of the court of Common Pleas: and on the 5th of *May* 1744, after hearing counsel on the matter reserved, the court of Common Pleas pronounced judgment, and declared the commission issued regularly (1).

The commissioners afterwards proceeded in the execution thereof, and several debts, amounting to 30[illegible]5 *l.* 19 *s.* 11 *d.* ¼. were proved under the commission, and all of them, except 47 *l.* 3 *s.* 4 *d.* were the debts due from the partnership.

Since the commission issued, *Burnaby* and *Barbut*, by the perception of the profits of the undertaking, received much more than would satisfy all the joint creditors, all of whom, since proving their debts under the commission, had received from *Burnaby* and *Barbut* either a satisfaction, or undeniable security for the same.

The petitioner offers to pay into the bank of *England* such a sum as the court shall think proper, on being allowed a reasonable time for the doing thereof, in satisfaction of the debts so proved under the commission.

And therefore prays that it may be referred to a master to see what the provisional, and other assignees had received of the petitioner's joint and separate estate; and how and to whom, and for what the same, or any part thereof, have been disposed of and applied; and, after just allowances made, that they might assign to the petitioner such part of his estate and [illegible] as should appear to remain in their hands; and that the master might also inquire which of the creditors had received any satisfaction or security, and from whom, for the debts so by them respectively proved under the commission; and that in case any of them who had received securities for their debts should elect to receive satisfaction out of the money he now offered to pay into the bank, such securities might be assigned to the petitioner, or to persons whom he should appoint, in order to recover the money due thereon; and that upon payment or making satisfaction to the several creditors, who had proved their debts under the commission, the same might be superseded.

Lord Chancellor: I do not blame Mr. *Crisp* the petitioner for not applying sooner to the court for a *supersedeas*, because by a former order, a trial with regard to the bankruptcy being directed, it was necessary that trial should be had first.

When this case came originally before me, I thought it a pretty new one; a commission of bankruptcy taken out against one partner for a partnership debt, without joining the other partners in the commission, and therefore directed a trial of the bankruptcy before Lord Ch. Jus. *Willes*.

(1) See *Ex parte Caruthers*, 1 *Cooke's B. Laws*, 19, *Ex parte Upton*, *ibid* 20.

Whatever

Whatever doubts I might have before, it is now established to be law, on the unanimous opinion of the court of Common Pleas, that a *commission of bankruptcy* may issue against one partner only for a joint debt; though to be sure *in an action at law against one partner*, it could not be maintained unless the other two are joined in it.

Ex parte CRISP.

The commissioners have certified that this is a proper time to supersede the commission, and that the circumstances are likewise proper for doing it.

[135]

But suppose the majority of creditors present at any meeting may have said, We desire you will certify that the commission ought to be superseded, and one creditor had declared he shall be able to prove in a few days, and desired a delay; the court would certainly in that case refuse to supersede the commission, and give such creditor an opportunity of proving the debt, in the first place, [illegible] the bankrupt may remove into a foreign country, [illegible] creditors who were under any incapacity of [illegible] particular circumstances lose their debts.

Though a majority of creditors agree to certify, that commission ought to be superseded at a meeting for that purpose, yet if [illegible] I shall be able to prove in a few days, do not certify yet, [illegible] will not [illegible], till such creditor [illegible] his debt.

[illegible] *Barnaby* and *Barker*, the two other partners [illegible] a large sum, and insisted [illegible] commission, and therefore oppose [illegible].

[illegible] no hazard, for I do not [illegible] his share in the [illegible] whole [illegible] effects in their hands, and [illegible] objection to the *supersedeas*.

[illegible] I do not think it right to direct, as the petitioner [illegible] the other two partners [illegible] proved debts under the commission, [illegible] bankrupt. Indeed where there is a principal and surety, and [illegible], he is intitled to have an assignment of the [illegible], in order to enable him to obtain satisfaction for what he has paid over and above his own share; but it will be extremely hard [illegible] given by *Barnaby* and *Barker* [illegible] to the creditors for the payment of their debts, to be assigned [illegible], and therefore I will give such directions as will effectually answer the intent of all parties.

Where there is a principal and surety, and surety [illegible] debt, he is intitled to have an [illegible] to enable him to obtain satisfaction for what he has paid over his own share.

His Lordship ordered that upon the petitioner's paying within one calendar month from the date hereof, to all the creditors who have already proved their debts under the said commission, the whole of their respective debts so proved by them under the commission, and the costs of the commission and of the proceedings at law, the commission be thereupon superseded: and he also ordered that the several creditors of the petitioner, who have proved their debts under the commission, do assign the several securities that have been given to them by any of the partners, for their respective demands proved under the commission, to a trustee or trustees to be appointed by the commissioners, in trust to secure to the petitioner, and any other of the partners, so much money as he or they have respectively paid or shall pay towards the discharge

Ex parte Crisp.

charge of such debts, over and above their respective just portions thereof; and ordered that the assignees under the commission do re-assign to the petitioner all his estate and effects which have been assigned to them, and that they come to an account before the commissioners, for the estate and effects of the petitioner come to their hands, and that they pay to the petitioner the balance which upon such account to be taken shall appear to be remaining in their hands. But if the petitioner shall make default in making the several payments, within the time before limited, his Lordship in that case ordered that the commissioners be at liberty, and do thereafter proceed in the execution of the commission.

December the 23d, 1742.

Ex parte Baudier.

Vide under the Division, Joint and separate Commission.

January the 22d, 1745.

Ex parte Bond and Hill.

Vide under the same Division.

January the 20th, 1746.

Ex parte Titner.

Case 77.

H. a silkman, and *F.* a dealer in coals, are partners in both trades.

HAYCOCK, a silkman, entered into partnership with *Francis*, a dealer in coals, to be mutually partners in both trades.

They afterwards dissolve the partnership and *F.* gives *H.* a release of all demands, and took upon him the payment of the debts due from the coal trade, and *H.* the debts from the silk trade, and the respective debts are assigned accordingly.

Some years afterwards they agreed to dissolve the partnership, and at the time of the dissolution, upon the balancing of accounts, *Francis* gives *Haycock* a release of all demands, and took upon him the payment of debts due from the coal trade, and *Haycock* the payment of the debts from the silk trade, and the respective debts were assigned accordingly.

H. dies, and a commission is taken out against *F.* and the messenger attempting to seize the effects of *H.* in the hands of his representative, is opposed, and turned out of possession.

Haycock died, and soon after his death a commission of bankruptcy was taken out against *Francis*, and by virtue of a warrant of seizure the messenger under the commission attempted to seize the effects of *Haycock* in the hands of his representative, who opposed the messenger, and turned him out of possession.

The assignee petitions, complaining of the force upon the messenger.

A petition was preferred by the assignee of *Francis*, complaining of this force upon the messenger.

Lord

Ex parte TITNER.

Lord Chancellor was of opinion, that by virtue of the releafe from *Francis* to *Haycock*, the whole property of the filk trade from the diffolution of the partnerfhip vefted in *Haycock*, and that the affignee could ftand in no better light than *Francis* himfelf, who had relinquifhed all his claim, and therefore that the goods of *Haycok* ought not to have been feized at all under the commiffion againft *Francis*.

By the releafe of *F.* to *H.* the whole property of the filk trade vefted in *H.* and the affignees of *F.* ftanding in no better light than the bankrupt, the goods of *H.* ought not to have been feized under the commiffion againft *F.*

But though the taking of thefe goods by the meffenger was illegal, yet the turning him out of poffeffion by force cannot be juftified, for the owner of the goods ought to have afferted his right by a due courfe of law; however, the evidence on the part of the petitioner was fo flight, that it does not by any means fupport the charge, and therefore his Lordfhip difmiffed the petition with cofts.

Petition difmiffed with cofts.

In the Matter of the *Simpfons*, Bankrupts.

December the 21ft, 1752.

Cafe 78.

JOHN Simpfon the elder, and *Thomas Simpfon* his coufin, were partners for a fpecial purpofe.

John the elder, *Thomas*, and *John* the younger, were alfo partners.

A commiffion was taken out againft *John* the elder and *Thomas*.

John the elder afterwards died.

A fecond commiffion was then taken out againft *John* the younger, and *Thomas*.

Afterwards *Thomas* died.

A feparate commiffion was now taken out againft *John* the younger.

The prefent petition was prefented on behalf of the affignees under the fecond commiffion to fuperfede the feparate commiffion, as feparate creditors may by order come in, and prove their debts under the former commiffion.

Mr. Sollicitor General for the petitioning creditor in the feparate commiffion, cited *ex parte Rollinfon*, 4th of *February* 1735, to fhew, notwithftanding a joint commiffion is depending, that feparate creditors might take out a feparate commiffion.

The cafe cited was as follows: *Rollinfon* was a bond creditor of *A.* and *B.* A joint commiffion was taken out againft them, and alfo two feparate commiffions; *Rollinfon* proved his debt under the joint commiffion, and afterwards petitioned to be admitted a creditor under each of the feparate commiffions. Lord *Talbot* would not grant the petition, becaufe it would break in upon the rule of equality amongft creditors under commiffions of bankruptcy eftablifhed in this court, but gave the petitioner a fortnight to make his election, whether he would come under the joint, or the feparate commiffion, and would not fuperfede the feparate commiffion.

Lord

In the matter of the *Simpſons*.

Formerly where there were ſeveral partners, the cuſtom was to take out ſeparate commiſſions againſt each partner, as well as a joint commiſſion; but this being of late thought a very unreaſonable practice, and occaſioning great confuſion with regard to bankrupt's effects, has been diſcountenanced, and the court keep only one commiſſion on foot, and direct diſtinct accounts to be kept of the ſeveral eſtates.

Lord Chancellor: Formerly, where there were ſeveral partners, they uſed to take out ſeparate commiſſions againſt each partner, as well as a joint commiſſion.

This practice being of late thought a very unreaſonable one, as occaſioning great confuſion with regard to bankrupts' effects, has been diſcountenanced. The preſent caſe is, one ſurviving partner of three perſons, the joint effects veſt in him in law, and under this commiſſion may be properly diſtributed.

A creditor by bond upon the partnerſhip, after a joint commiſſion is depending, takes out a ſeparate commiſſion againſt *John Simpſon* the younger; ſo that now here are two commiſſions againſt the ſame perſon, which will create endleſs confuſion, and ſeems to me to be only a ſtruggle for the aſſigneeſhip and the clerkſhip, for there is no doubt but this particular creditor may have a ſatisfaction under the firſt commiſſion.

His Lordſhip therefore ordered the laſt commiſſion to be ſuperſeded, and by conſent of the aſſignees the firſt was ſuperſeded likewiſe; and the creditors in general were ordered to come to a new choice of aſſignees under the ſecond, the now only ſubſiſting commiſſion.

His Lordſhip alſo gave directions that there ſhould be diſtinct accounts kept of the ſeveral eſtates, and reſerved the diſpoſition of the effects for the conſideration of the court.

Where there is a joint commiſſion, ſeparate creditors ought not to take out a ſeparate one, but apply to be admitted to prove their debts under the joint, as being a means of ſaving expence to the creditors.

By this opinion of *Lord Chancellor*, it ſhould ſeem for the future, that where there is a joint commiſſion depending, ſeparate creditors ought not to take out a ſeparate commiſſion, but apply for an order to be admitted to come in, and prove their debts under the joint commiſſion, as being a means of ſaving an expence to the creditors.

Upon application of joint creditors to be admitted to prove their debts under a *ſeparate* commiſſion, his Lordſhip ordered it *proviſionally*, that they ſhould be admitted creditors, and aſſent or diſſent to the bankrupt's certificate, becauſe it would otherwiſe clear him of the debts of joint creditors, as well as ſeparate.

N. B. His Lordſhip had formerly, upon an application of joint creditors to be admitted to prove their debts under a ſeparate commiſſion, ordered it proviſionally, that they ſhould be admitted creditors, and aſſent or diſſent to the bankrupt's certificate, becauſe the certificate otherwiſe would clear him of the debts of joint creditors as well as ſeparate (1).

Vide ante 98 the caſe *ex parte Baudier*, *December* the 23d 1742, which ſeems to vary from the preſent caſe.

(1) But it ſeems now ſettled, that a *joint* commiſſion cannot be ſupported, while a ſeparate one is ſubſiſting. *Ex parte Proudfoot*, *poſt*. 253. 1 *Cooke's B. Laws* in margin. *Martin* v. *O'Hara*, *Cowp*. 824. *Sed vide Ex parte Hardcaſtle* 1 *Cooke's B. Laws* 8.

(N) *Rule as to Costs*

Anon'.

Mich. Term, 1739. At the Rolls.

Vide under the Division, Rule as to Assignees.

[139]

Ex parte Goodwin.

April the 30th, 1740.

Vide under the Division, Rule as to his Executor, or where he is one himself.

Ex parte Smith.

March the 31st, 1742.

Case 79.

If a whole petition is recited in an affidavit of service, the court will make the attorney who drew it, pay the costs out of his own pocket.

IN an affidavit of service upon the assignee, who was petitioned against to be displaced, in order to swell up the expence, the whole petition verbatim was recited in the affidavit.

Lord Chancellor: I by no means like this practice, and it is what attornies in the country are very apt to fall into; but if they make a custom of it, I shall, for the future, order the costs of the affidavit to come out of their own pockets.

Ex parte Whitchurch.

August the 13th, 1742.

Vide under the Division, Rule as to Assignees.

Ex parte Gulston: In the Matter of *William Gulston* a Bankrupt.

February the 3d, 1753.

Case 80.

S. C. post. 193.

An issue had been before directed to try the bankruptcy of G. and found him no bankrupt agreeable to the judge's direction: a commission of bankruptcy is proceeding at law in the first instance, and if costs are given there, it will follow of course in the proceedings before this court.

THE issue directed by *Lord Chancellor* to try the bankruptcy of thepetitinoer, was accordingly tried before Lord Chief Justice *Lee* at *Guildhall*, who certified that the jury have found *Gulston* no bankrupt, agreable to the judge's directions. Application was made on the part of *Gulston* to supersede the commission, and that *Dale* the petitioning creditor might pay the costs in equity, as well as at law.

Lord Chancellor: I am of opinion that costs here in this case, are a consequence of the verdict at law, and that a creditor is not wantonly to take out a commission against a debtor, unless it is upon a plain and express act of bankruptcy, especially when *Dale* had a more natural remedy, for he might have proceeded against *Gulston* in *Barbadoes* for his debt, as the law is open there; and this is quite a different case from a common suit in equity by bill, where it begins first in this court, and is a single proceeding only; but taking out a commission of bankruptcy is a proceeding at law in the first instance, and all that is done afterwards is consequential, and if costs are given at law, it will follow of course in the proceedings before this court.

Ex parte GULSTON.

His Lordship ordered, that the commission be superseded, and that a writ of *supersedeas* do issue for that purpose, the expence whereof to be paid by *Dale* the creditor, who sued out the commission; and his Lordship further ordered, that it be referred to Master *Montague* to tax the petitioner *William Gulston* his costs at law, and of the several applications to this court in this matter, which costs, when taxed, *George Dale* the petitioning creditor was thereby directed to pay to the petitioner *William Gulston*.

August the 10th, 1754.

Anon'.

Case 81.

Costs accrued by protesting bills before a commission issues, may be proved, but no part of the costs arisen afterwards.

THE question in this petition, whether the costs and charges accrued by the protesting bills after a commission of bankruptcy issued, can be proved?

Mr. Attorney-general for the bill creditors insisted, that as the notes were accepted by the bankrupt, though protested after the commission issued, yet as the protesting was a consequence of the party's accepting not paying the bills, they may by relation be considered as one intire transaction, and consequently the petitioners were intitled to prove the costs and charges thereof under the commission.

Lord Chancellor asked some of the commissioners who happened to be then present in court, whether, if a person has a verdict for a debt, and is prosecuting to a judgment, or has recovered damages in an action, and is going on to execute a writ of inquiry, but before either of them is compleated, a commission of bankruptcy is taken out against the defendant, the costs and charges of such prosecuting to a judgment, or such assessment of damages on a writ of inquiry, have been allowed to be proved under a commission.

The court being informed, that it was the constant practice of commissioners to refuse such costs being proved (1) his Lordship made the following order, that the costs of the protests arisen before the commission should be proved by the petitioners, but no part of the costs arisen afterwards (2).

(1) *Contra Aylett* v. *Harford*, 2 *Black.* 1317. *Blandford* v. *Foote Cowp.* 138. *Ex parte Talbot*, 4 *Burr.* 2445. *Langford* v. *Ellis*, 1 *Cooke's B. Laws* 227. *Ex parte Simpson.* 3 *Bro. Cha. Rep.* 46.

(2) So *Ex parte Moore*, 2 *Bro. Cha. Rep.* 597.

(O) *The Construction of the repealing Clause in the 10th of Queen Anne.*

Ex parte Burchall: In the Matter of *Robert Burchall* a Bankrupt. *April* the 2d, 1742.

Case 82.

The statute of the 10th of Q. *Ann. c.* 15. repeals only that part of the statute of the 21 *Jac.* 1. *c.* 19. which constitutes a bankrupt, but not the description of the trade or occupation of the person against whom the commission issue.

THE petitioner was bred a *Money Scrivener*, and had used the trade or profession of a *Money Scrivener* for ten years, and now preferred a petition, by way of caveat, and prayed to be heard before a commission of bankruptcy issued against him, insisting, that as a *Scrivener* he was not liable to be a bankrupt; for that though by the statute of 21 *Jac.* 1. *cap.* 19. a *Scrivener* was included in the description of a bankrupt, yet this description among some others was repealed by the statute of the 10 *Ann. cap.* 15. which was not a temporary, but an absolute repeal, nor restored by any subsequent act.

The clause is as follows:

"Whereas by an act made in the 21 *Jac.* 1. it is amongst "other things enacted, That all and every person and persons, "using or that should use the trade of merchandize by way of "bargaining, *&c.* in gross, or by retail, or seeking his or her "living by buying and selling, *or that should use the trade and pro-* "*fession of a* Scrivener, *receiving other mens monies or estate into his* "*trust or custody*, who at any time after the end of the said session "of parliament, being indebted to any person or persons in the "sum of 100*l.* or more, should not pay or otherwise compound "for the same within six months next after the same should grow "due, and the debtor be arrested for the same, or within six "months after an original writ sued out to recover the said debt, "and notice thereof given unto him, or left in writing, *&c.* or "being arrested for the sum of one hundred pounds or more of "just debts should, at any time after such arrest, procure his "enlargement by putting in common or hired bail, should be "accounted and adjudged a bankrupt to all intents and purposes; and in the cases of arrest or getting forth by common "or hired bail from the time of his or her said first arrest: and "whereas it is found by experience, that many and great mischiefs and inconveniencies have happened, especially of late, "to trade and credit in general, by reason of the said descriptions of a bankrupt: for remedy thereof for the future, be it enacted, That the said act, and also all and every other act "and acts of parliament whatsoever, so far as they relate to "the said descriptions of a bankrupt, be repealed and made "void, and that no persons within the said descriptions, or any "of them, shall for or by reason of the same be taken and [142] "adjudged to be within the statute or statutes of bankrupt whatsoever."

Lord Chancellor: My doubt is, whether the 10th of Queen *Ann* intended any more than to repeal some part of the statute of 21 *Jac.* 1. which constitutes an act of bankruptcy; and not the

Ex parte BURCHALL.

the description of the trade, or occupation, of the person against whom a commission issues.

Mr. *Brown* the counsel for the petitioner insisted, that the statute of Queen *Ann* repeals the additional description of a trader in the 21 *Jac.* 1. which is not in the precedent acts, and that the description of a *Scrivener* is in this act only.

Now all the bankrupt acts have the description of using the trade of merchandize, and getting his living *by buying and selling*, and if Mr. *Brown's* construction should prevail, the description of a bankrupt, by the expression of *buying and selling, is as much repealed as the other.*

The statute of the 21 *Jac.* 1. has superadded *a Scrivener*, and this is merely an addition to the quality of the trade or profession of the person who shall be a bankrupt; one of the descriptions to constitute a bankruptcy under this act, is suing out an original writ, *&c.* another an arrest, and procuring common or hired bail, *&c.* these being found inconvenient, gave rise to the clause of the 10th of Queen *Ann.*

Consider how much is recited by this statute, not the whole description of a bankrupt, or the general or common qualifications of the person of a bankrupt, or his buying and selling, *&c.* if such a construction was right as has been contended, then all the other acts of parliament would be repealed.

It is only *particular acts of bankruptcy* which are made void, and not the qualification of the person; and I have no doubt myself, but the construction I have put upon this repealing statute, is the proper and only safe construction.

His Lordship ordered, that the petitioning creditor be at liberty to sue out a commission of bankruptcy against *Burchall*, and in case the major part of the commissioners should thereon declare him to be a bankrupt within the intent and meaning of the several statutes concerning bankrupts, then he directed the commissioners to execute a provisional assignment of *Burchall's* estate and effects, to an assignee appointed by them under the commission, and also directed an issue to try whether he was a bankrupt within the true intent and meaning of the several acts concerning bankrupts, at or before the issuing of the commission, the petitioning creditor to be the plaintiff, and the issues to be tried the next term before Lord Chief Justice *Willes.*

A *Scrivener* is comprehended in the words *bankers, brokers,* and *factors,* in the statute of the 5 *Geo.* 2. c. 30. 39. and petitioner being one the court ordered the commissioners should proceed in the execution of the commission.

The Chancellor inclined to think that a *Scrivener* is implied in the following clause of the 5 *Geo.* 2. "And whereas persons "dealing as bankers, brokers, and factors, are frequently in-"trusted with great sums of money, and with goods and effects "of very great value belonging to other persons; It is hereby "further enacted, That such bankers, brokers, and factors "shall be, and are hereby declared to be, subject and liable to "this and other the statutes made concerning bankrupts." But

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his Lordſhip did not give a poſitive opinion as to this point, and ordered all further directions to be adjourned over till the next day of petitions. *Ex parte* BURCHALL.

The next day his Lordſhip, upon conſidering the clauſe, declared he was clearly of opinion, a *Scrivener* was within the meaning thereof, and comprehended in the words *bankers*, *brokers*, and *factors*, and therefore directed ſo much of the order as related to the iſſue for trying the bankruptcy, to be ſtruck out.

Upon the 8th of *May* 1742, there was a petition *ex parte Burchall* and *Tribe* when *his Lordſhip ordered*, *that the commiſſioners ſhould proceed in the execution of the commiſſion*, and the other petitioner *Thomas Tribe* being preſent in court, that had *Burchall* in execution at his ſuit, and acquainting his Lordſhip, that he now elected to ſeek relief for his debt under the commiſſion againſt *Burchall*, and being alſo the petitioning creditor, *his Lordſhip ordered* Tribe *forthwith to diſcharge* Burchall *out of the* Marſhalſea.

(P) *Rule as to Dividends.*

Ex parte Lane.

October the 22d, 1741.

Vide under the Diviſion, Rule as to Aſſignees being charged with Intereſt.

Ex parte Kirk.

October the 26th, 1745.

Vide under the Diviſion, Drawers and Indorſers of Bills, &c.

Ex parte Stiles and Pickart.

February the 2d, 1748.

Vide under the Diviſion, Rule as to Allowance to Bankrupts.

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(Q) *Commiſſion ſuperſeded.*

Ex parte Goodwin.

April the 30th, 1740.

Vide under the Diviſion, Rule as to his Executor, or where he is one himſelf.

Ex parte Gulſton.

February the 3d, 1743.

Vide under the Diviſion, Rule as to Coſts.

Ex parte Criſp.

Auguſt the 2d, 1744.

Vide under the Diviſion, Rule as to Partnerſhip.

December the 22d, 1749.

Ex parte Gayter.

Case 83.

On superseding a commission, the court may either direct an enquiry before a Master of the damages sustained by the bankrupt, or a *quantum damnificatus* upon an issue at law, and, after damages are settled, may, for the better recovery thereof, order the bond given by petitioning creditor to be assigned to the bankrupt.

MR. *Gayter* was the petitioning creditor in a commission of bankruptcy against *A.* but not being able to prove *A.* a bankrupt at the time the commission issued, it was superseded; and on a former day of petitions, *Lord Chancellor*, upon the application of *A.* made an order for assigning the bond to *A.* given by the petitioning creditor to his Lordship at the time of suing out the commission.

The present application is to discharge that order, or at least to suspend any action upon the bond, till the damages sustained by *A.* were inquired into.

The consideration of the plaintiff's debt on which he sued out the commission, was of a very extraordinary nature, 25 *per cent.* being charged for money pretended to be advanced, and fifteen guineas for a premium, and other exorbitancies.

Lord Chancellor said it was in the breast of the court, where the bankruptcy was a doubtful case, and the commission superseded, either to direct an inquiry before a master of the damages sustained by the bankrupt, or a *quantum damnificatus* upon an issue at law, and after the damages are settled, the court might, [145] for the better recovery thereof order such bond to be assigned; but the present case was attended with such flagrant circumstances, that he would not by a previous enquiry into the damages sustained by *A.* prevent him from seeking an immediate satisfaction, and therefore dismissed the petition (1).

(1) See *Chapman* v. *Pickersgill*, 2 *Wilf.* 145. *Brown* v. *Chapman*, 3 *Burr.* 1418. 1 *Black.* 427. S. C.

March the 28th, 1751.

Ex parte Leaverland.

Case 84.

After two dividends the creditors release the bankrupt of all further demands, he petitions to supersede the commission, and for liberty to collect in the debts still due to the estate. The bankrupt admitted to stand in the place of the assignees to get in the remainder of the debts; but his Lordship would not supersede the commission for his sake, as it would intirely defeat his certificate.

THE petitioner was a bankrupt in 1724, divided upon two dividends six shillings in the pound, had his certificate in 1728, and on paying the creditors two shillings and sixpence more in the pound, they by deed released him of all further demands.

A petition by the bankrupt to supersede commission, and as there are other debts due to the estate not got in by the assignees, he prays that he may be impowered to collect them in.

Lord Chancellor said it was imprudently prayed by the petitioner, for superseding the commission will intirely defeat the certificate, and therefore varied his order from the prayer of the petition, by directing that he should stand in the place of the assignees to get in the remainder of the debts, on giving a proper indemnity to the assignees, that they may not be called to an account for such money so received; but would not supersede the commission for the sake of the bankrupt.

Ex parte Desanthuns. June the 21st, 1753.

Case 85.

After a commission of bankruptcy has been proceeded upon in the usual manner, and all the creditors have acquiesced in it, and the whole compleatly finished, the court will not supersede it, tho' the act of bankruptcy committed, before the petitioning creditor's debt arose, is of a doubtful nature.

ALL the creditors, but two, under a commission against *Penton*, petition to supersede it, upon a suggestion that the debt of the petitioning creditor was not contracted till after the bankruptcy committed.

The commission was taken out in 1751, and there was no pretence that the petitioning creditor's debt was not a just one, and *Penton* therefore was declared a bankrupt by the commissioners. The commission was proceeded upon in the usual manner, all the creditors acquiesced in it, and the whole was compleatly finished.

The act of bankruptcy pretended to be committed was a secret one in 1750, *a denying himself* when creditors called upon him, though at home: the persons who asked for him were three in number, one was paid afterwards the very day he called, the other the next day, the third the beginning of *September*, and did not call till the latter end of the *August* before.

Every one of the persons traded with him as before, and what is still more material, *Penton* appeared for months together as publickly as before, and from the nature of his employment was more visible than ordinary, because he kept a garden and house of entertainment, after the manner of *Vauxhall*. [146]

The petitioner had a judgment against the bankrupt upon a debt for goods sold.

The bankrupt, between *June* 1750 and *August* 1751, contracted a new debt for wine with the petitioning creditor; he then took out execution, and entered upon the garden, &c. but the goods taken in execution were not sufficient to pay him by 250 *l.*

In *October* 1751, a commission of bankruptcy was taken out against *Penton*, and the petitioner proved his remaining debt of 250 *l.* under it.

The assignees brought an action against the petitioner to recover back the goods taken in execution, and upon the evidence of one *Rose*, *Penton* appearing to have committed an act of bankruptcy before the petitioning creditor's debt was contracted, it would have defeated the commission itself of course, and the plaintiffs therefore chose to submit to a nonsuit.

Lord Chancellor: This seems to be a contrivance from the beginning to the end to exclude some creditors, whose debts were contracted after an act of bankruptcy committed; and as it was in the plaintiffs' own breast whether they would submit to a nonsuit or not, this is not a sufficient determination of the bankruptcy: and therefore I will not supersede the commission, especially when the act of bankruptcy pretended to be committed before the petitioning creditor's debt arose, is of such a doubtful nature.

August the 14th, 1742.

Ex parte Sydebotham.

Case 86. A commission superseded, because it issued against an infant.

IN *April* last a commission of bankruptcy issued against the petitioner, and he was declared a bankrupt; but at the time of the issuing of the commission, and of preferring this petition, he was an infant under the age of 21 years, and therefore insisted by his counsel, that he is not to be deemed a bankrupt, within the true meaning of the statutes in force against bankrupts, and that for this reason the commission ought to be superseded, and that a writ of *supersedeas* should be directed for that purpose at the expence of *Alice Williamson*, the creditor on whose petition the commission issued.

Lord Chancellor: The petition must be allowed, for notwithstanding Lord *Macclesfield* held in the case of one *Whitlock*, that an infant might be a bankrupt, yet it has been determined otherwise since.

His Lordship ordered that the commission be superseded, and that a writ of *supersedeas* should issue for that purpose (1).

(1) *Rex* v. *Cole*, 1 *Ld. Raym.* 443. 12 *Mod.* 243. *Bull. N. P.* 38. *Ex parte Meymot*, *post*. 201.

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August the 3d, 1751. 2 Vez. 407. pl. 230. S. C.

Ex parte Hylliard.

Case 87. A. treated with the petitioner, against whom a commission of bankruptcy hath been awarded for the purchase of the equity of redemption of his estate, in mortgage to F. 400*l*. agreed for the purchase, articles signed, and A. pays 251*l*. 1*s*. to clear off the mortgage, and was to pay 150*l*. more on the execution of conveyances.

A Petition to supersede the commission on a suggestion that Mr. *Alsworth*'s debt was not of such a nature, as intitled him under the bankrupt acts to sue out a commission. Mr. *Alsworth* treated with the petitioner for the purchase of the equity of redemption of his estate, which was in mortgage to one Mr. *Field*. Four hundred pounds was the price settled for the purchase, articles were signed, and Mr. *Alsworth* paid *Hylliard* 251*l*. 1*s*. to clear off the mortgage, and was to pay him 150*l*. more on the execution of the conveyances.

On petitioner's refusing to compleate the purchase, or pay the mortgage, A. brought an action against the petitioner, who is carried to gaol, where he lay two months, and upon this declared a bankrupt.

Hylliard refused to complete the purchase, or to pay off the mortgage.

On this Mr. *Alsworth* brought an action for 251*l*. 1*s*. against *Hylliard*, who was carried to gaol, where he lay two months; and thereupon Mr. *Alsworth* takes out a commission of bankruptcy, and *Hylliard* is declared a bankrupt on this act of bankruptcy.

Petitioner applies now to supersede the commission, on a suggestion that A's debt is not of such a nature as intitles him to sue out a commission.

Mr. *Evans* for the petitioner insisted, that this was not such a debt as is within the meaning of the bankrupt acts.

That an *indebitatus assumpsit* could not be maintained, for the 250*l*. was a breach of trust only, and not a debt.

Mr. *Clark*,

Mr. *Clark*, who was counsel on the other side, insisted it was a debt, and money had and received to the bankrupt's use, and an action therefore maintainable as for his debt.

Ex parte HYLLIARD.

Mr. *Evans* in the reply urged, that there was no pretence that the 150*l.* or one penny thereof was ever tendered to *Hylliard*, but was told that he must either repay the 251*l.* 1*s.* or go to gaol.

No one creditor appeared under the commission; by that means Mr. *Alsworth* has, by virtue of chusing himself assignee, got into his possession all *Hylliard's* effects, although 'tis sworn he does not owe any person besides a farthing.

Lord Chancellor: I doubt extremely whether a commission could be taken out on such a contract, for the remedy should have been a bill for performance of the contract, and no action could in strictness of law be maintained.

His Lordship doubted whether *A.* could take out a commission on such a contract, for the remedy ought to have been a bill for performance of the contract, and no action could be maintained; but said, if it stood simply on this, he would not have superseded the commission, but left the bankrupt to try the bankruptcy at law. But as *A.* has, since the issuing of the commission, taken an assignment of the mortgage, he would not suffer him to proceed in the commission; for, as standing in the place of the mortgagee, he may hold till redeemed, and likewise compel a performance of the contract, or petitioner to refund the 251*l.* 1*s.*

But if it stood simply upon this footing I should not have superseded the commission, but left the bankrupt to an action at law to try the bankruptcy. [148]

But as it comes out now that Mr. *Alsworth* has since the issuing of the commission taken an assignment of this very mortgage, I will not suffer the commission to go on; for, as standing in the place of the mortgagee, he may hold till redeemed, and likewise compel a performance of the contract, or *Hylliard* to refund the 251*l.* 1*s.*

The receipt given by *Hylliard*, is nothing but an acknowledgement of receiving 251*l.* 1*s.* in part of the purchase money.

No action in this case could be maintained, and therefore the very foundation for the commission failed; and Mr. *Alsworth* has, by taking an assignment of the mortgage, got the security of the mortgage for the money he has paid.

The affidavits on both sides swear, that the petitioning creditor said, either pay me back the money, or convey to me the equity of redemption, and not a word of the petitioning creditor's offering to pay the 150*l.* the remainder of the purchase money.

The commission therefore must be superseded, and the petitioning creditor pay the costs; for any expressions of *Hylliard's* that he was able to live in gaol, or any where else, and such like, proceeded from this ill usuage, and will not forfeit his costs (1).

(1) See *Medlicot's case* 2 *Stra.* 899. *Ex parte Lee*, 1 *P. W.* 783.

(R) *Rule as to Bankrupt's Attendance on Assignees.*

June the 22d, 1742.

Ex parte Turner.

Case 88.

The attendance of a bankrupt on the assignees to assist them in making out the accounts of his estate, seems to be confined by the 5th of the present king to the 42 days, or the enlarged time at most; but if the assignees will undertake for the creditors under the commission, that they shall not arrest him, the court will order him to attend, notwithstanding any risque he may run from his creditors at large.

THE assignee under a commission of bankruptcy gave notice in writing to the bankrupt to attend him in order to explain several matters relating to his estate after the 42 days were expired (during which time, by the 5th of the present king, he is to be free from all arrests, restraints or imprisonment), and before the certificate was signed.

The bankrupt would not attend upon any other terms than signing his certificate, and the application to the court is founded upon this, that the bankrupt had refused to attend, contrary to the act of parliament made in the 5th of the present king.

Lord Chancellor: . Notwithstanding the 5th of the present king has these general words, "That all and every such bankrupt or bankrupts, not in prison or custody, shall *at all times* after such surrender as aforesaid be at liberty, and is and are hereby required to attend such assignee or assignees upon every reasonable notice in writing for that purpose, given by such assignee or assignees unto such bankrupts, or left for him, her, or them, at his, *her, or their house or place of abode, in order to assist, and shall assist such assignee or assignees, in making out the accounts of the said bankrupt's estate and effects." Yet the subsequent clause (which is in these words. "That all and every bankrupt or bankrupts having surrendered, shall at all seasonable times before the expiration of the 42 days, or such further time as shall be allowed to such bankrupts, to finish their examination, be at liberty to inspect their books, *&c.* in presence of such assignee or assignees, or some person to be appointed by such assignee or assignees for that purpose, and to take and bring with him, for his assistance, such persons as he shall think fit, not exceeding two persons at any one time, and to make out such extracts and copies from thence as he shall think fit, the better to enable him to make a full and true discovery and disclosure of his estate and effects; and in order thereto the said bankrupt or bankrupts shall be free from all arrests, restraint, or imprisonment of any of his, her, or their creditors in coming to surrender, and from the actual surrender of such bankrupt to the commissioners, *for and during the said forty two days, or such further time as shall be allowed to such bankrupt or bankrupts, for finishing his examination*,") seems to confine it to the 42 days, or the enlarged time at most, and therefore the bankrupt's protection from arrests, *&c.* can extend no further.

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The Chancellor asked the petitioner's counsel, if their client would consent to indemnify the bankrupt from arrests, but he refusing to do it, his Lordship proposed that he as assignee should only undertake for the creditors who have sought relief under the commission, that they would not arrest him, and if

so,

so, he would order the bankrupt to attend, for he said, he should not pay any regard to the danger the bankrupt might run, from his creditors at large. *Ex parte* TURNER.

This petition, at the request of the petitioner, was ordered to stand over till the next day of petitions, that he may endeavour, in the mean time, to get the rest of the creditors under the commission, to consent to these terms.

Upon the whole, *Lord Chancellor* said, That the clauses in the act of parliament, relating to this matter, are very darkly and obscurely penned, arising chiefly from the words *forty two days* being thrown into the latter clause.

(S) *Rule as to an Apprentice under a Commission of Bankruptcy.*

Ex parte Sandby. *January* the 22d, 1745.

THE petitioner, on the 10th of *January* 1744, was put apprentice to *Ward* a *Bookseller* at *York*, and the sum of eighty pounds was given with the petitioner as an apprentice *for seven years. In *July* following a commission of bankrupt was taken out against *Ward*, and being declared a bankrupt, assignees were chosen who sell off the bankrupt's effects, and he is now the supervisor of the press to the purchaser, and become incapable of performing his part of the contract, nor is the petitioner able to raise any money to put him out apprentice to another master, and the commission being a recent one, probably no dividend may be made in a year, or year and half; so that all this time will be lost to the petitioner. [*150]

Case 89. An apprentice where his master becomes a bankrupt, shall come in as a creditor only upon the remaining sum, after deducting for the time he lived with the bankrupt.

Upon these circumstances the petitioner prayed, that on deducting 10 *l.* out of the 80 *l.* for his board with the bankrupt during the six months he lived with him, that the assignees might be ordered to pay him the sum of 70 *l.* out of the effects of the bankrupt already come to their hands, and not oblige him to prove it as a debt under the commission.

Lord Chancellor was doubtful at first, and seemed inclined to grant the petition, but upon ordering the secretary of bankrupts to search for precedents, and two being produced in Lord Chancellor *King*'s time, and two in Lord Chancellor *Talbot*'s, where they directed an apprentice should come in as a creditor only (after deducting for the time he lived with the bankrupt) upon the remaining sum, his Lordship was pleased to make the same order, and that the petitioner should be admitted a creditor for 70*l.* only (1).

(1) *Barwell* v. *Ward*, *post*. 261. So if a father receives the money and earnings of a child, such child may be admitted as a creditor under a commission against him, *Ex parte Macklin*, 2 *Vef.* 675.

(T) *Rule as to discounting of Notes.*

June the 4th, 1746.

Ex parte Thompson.

Vide under the Division, Rule as to Drawers and Indorsors of Bills of Exchange.

August the 13th, 1746.

Ex parte Marlar, and others.

Case 90.

A person who takes no more for the discount of notes than at the rate of 5 *per cent. per ann.* shall prove the whole amount of those notes, under a commission of bankrupt against the drawer, without being obliged to deduct what he has received of the indorsor for the discount.

THE petitioners being possessed of several promissory notes under the hand of *Thomas Setcole*, payable to *William Dover* or order 6 months after date, and indorsed by him to the petitioners, amounting together to the sum of 975 *l.* 17 *s.* 0 *d.* which *Dover* discounted with the petitioners, and received the full value, after deducting 5 *per cent.* for the discount. On the 18th of *April* 1745 a commission of bankruptcy *issued against the said *Thomas Setcole*, and he was found a bankrupt, and *Marlar* attended at *Guildhall*, in order to prove the said debt upon the several notes, but having received the sum of 11 *l.* 5 *s.* 10 *d.* for the discount, the commissioners obliged him to deduct the same out of the sum of 957 *l.* 17 *s.* 0 *d.* and the commissioners also refused to let the petitioner prove the sum of 8 *l.* 6 *s.* 1 *d.* ½. being the interest of the said respective notes, when they respectively became due since the issuing of the said commission; and therefore the petitioners pray, that they may be admitted creditors for the said several sums of 11 *l.* 5 *s.* 10 *d.* and 8 *l.* 6 *s.* 1 *d.*

[*151]

The counsel for *Marlar* insisted the commissioners ought to have admitted him in both these respects, for the whole money contained in the notes, and likewise to be allowed interest on the notes.

Lord Chancellor: I am of opinion that the petitioner is intitled to the first part of his petition, as he swears he took no more for the discount of the notes, than at the rate of 5 *per cent. per ann.* and ordered accordingly.

The rule established by commissioners of bankrupts, that *note* creditors cannot prove interest upon them, unless expressed in the body thereof is a reasonable one, and the court will not break thro' it.

But as the commissioners have established it as a rule, that note-creditors have no right to prove interest upon them, unless it is expressed in the body of the notes (1); I will not break in upon this rule. Even at law, where notes are for value received, and interest is not expressed, the jury do not give the plaintiff, in an action upon the notes, interest for them, but by way of damages only (2).

Commissioners of bankrupts cannot award damages, and therefore the rule they have established is a very reasonable one, and the petition as to this must be dismissed, but ordered him to be admitted a creditor for the said sum of 11 *l.* 5 *s.* 10 *d.*

(1) See *Bromley* v. *Goodere*, *ante*, 80. But upon an application to supersede a commission, and a reference to a master to settle what is due to the creditors, notes will carry interest from the day of the master's report, tho' no interest is expressed in the body of such notes. *Ex parte Rooke*, *post*. 244.

(2) *Craven* v. *Tickell*, *Ves. Jun.* 63.

(V) *Rule as to a petitioning Creditor.*

Ex parte Goodwin.

April the 30th, 1740.

Vide under the Division, Rule as to his Executor, or where he is one himself.

Ex parte Wilson: in the Matter of *John Wilson* a Bankrupt.

August the 6th, 1743.

Case 91.

The clerk of the commission caused the bankrupt to be arrested at the suit of *J.* the petitioning creditor and assignee, in the sheriff's court of *London* for 80*l.* and also causes another action to be brought in *B. R.* for the same sum and kept him in custody till *J.* had an opportunity of arresting him on the King's Bench action, and afterwards charges him with another action, at the suit of one *Wass*; bankrupt applies to be discharged from both actions. *J.* and *W.* directed respectively to discharge him out of custody of the Marshal, as the same attorney was concerned in both actions.

THE petitioner states by his petition, that in *May* last a commission of bankruptcy issued against him upon the petition of *Nathan James* and others, upon which he was declared a bankrupt, and his estate and effects were assigned to *Nathan James* and others, and in *April* last a commission of lunacy issued against *James*, and he was found a lunatick; and notwithstanding he is one of the petitioning creditors and an assignee, Mr. *Fenwick*, the clerk of the commission, caused the petitioner, on the 16th of *June* last, to be arrested in the sheriff's court of *London* for 80 *l.* at the suit of *James*, and afterwards caused another action for the same sum to be brought in the court of King's Bench, and kept him in custody from four o'clock in the afternoon of the 16th of *June* until eleven o'clock the next morning, till *Fenwick* had an opportunity to arrest him on the King's Bench action; which being done, he withdrew the action in the Sheriff's court, and the petitioner was detained in custody upon the latter action, and was also charged the same day with another action, at the suit of one Mr. *Wass*, by *Fenwick* as his attorney, which the petitioner apprehends was contrived by *Fenwick* purely to oppress him, and therefore prays that he may be discharged out of the custody of the Marshal of the King's Bench upon the two actions.

Mr. Solicitor General, on behalf of the bankrupt *John Wilson*, insisted, that the arrest at the suit of *James*, as he was a petitioning creditor, is irregular; and being therefore under an improper arrest, *Wilson* ought to be discharged, not only from this suit, but from *Wass*'s likewise.

The counsel for *Wass* read affidavits to shew, that the bankrupt has been guilty of perjury in swearing, that part of his estate was in mortgage for 500 *l.* when in fact it was a gross fraud carried on between the bankrupt and the mortgagee, and hoped therefore he should not be discharged, even supposing there is some irregularity in the proceedings, as they shall never be able to catch him again, if once discharged.

A petitioning creditor cannot arrest a bankrupt because a commission of bankrupt is both an action and an execution in the first instance (1).

Lord Chancellor: As to the behaviour of the bankrupt, it is a collateral fact, and has nothing to do with the present question, and would come more properly before me upon a petition to dis-

(1) So *Ex parte Ward & Ex parte Lewes, post.* 153, 154.

Ex parte WILSON.

allow his certificate: the affidavit besides is not positive, but uncertain; and if more certain, would not do. This court will not suffer a petitioning creditor to arrest a bankrupt, and for this reason, because that a commission of bankruptcy is considered both as an action and an execution in the first instance; and after the petitioning creditor has laid hold of all the bankrupt's effects, it would be a great absurdity for the same person to be permitted to arrest him likewise. It is too material in this case, [153] that the whole is done by the same agent, and extremely probable that *Fenwick* arrested the bankrupt in the name of *James*, merely to found the arrest at the suit of *Wass*.

Even at law where there is an irregular arrest, and an advantage is taken of the irregularity, to charge him in custody also at the suit of another person, the courts of law will discharge him from both.

So likewise in this court, where advantage is taken of the injury and oppression a person lies under by an improper arrest, to charge him in custody, though for a just debt, this court will discharge him from both.

His Lordship therefore ordered that *Nathan James* and *Samuel Wass* do respectively consent to the petitioner's immediate discharge out of the custody of the marshal of the *King's Bench* prison, at their respective suits, and that they respectively execute proper authorities to the Marshal for that purpose. And ordered that *James* should pay to the petitioner the costs which the petitioner hath been put to by reason of the arrest at his suit, which he directed to be taxed by a Master.

December the 23d, 1743.

Ex parte Ward.

Case 92.

A petitioning creditor determines his election by taking out the commission, and cannot sue the bankrupt at law, though for a debt distinct from what he proved. Where persons refuse to prove debts under a commission, the barely being assignees will not determine their election, but they may still sue the bankrupt at law.

AN application to the *Lord Chancellor* to discharge the bankrupt now in the *Fleet*, at the suit of the petitioning creditor and the assignees, as they have determined their election by coming under the commission.

The petitioning creditor insisted, that the debt upon which he founded his petition for the commission, was upon two notes only from the bankrupt, and that he has sued him upon a third and distinct note of hand.

The assignees insisted that they had full liberty to sue the bankrupt at law, notwithstanding they are assignees under his commission, and creditors before his bankruptcy, because the majority in value of the creditors had chosen them as assignees, notwithstanding they had refused to prove any debt under the commission.

Lord Chancellor: The petition must be allowed as against the petitioning creditor, for he has determined his election by taking out the commission (1), and the affidavit on suing out the commission is general; nor does it mention the particulars by which a bankrupt becomes indebted.

(1) *Ex parte Wilson, ante* 152. *Ex parte Lewes*, the next case.

But

But there is no foundation to grant what the petition prays with regard to the assignees, for notwithstanding they are creditors of the bankrupt, yet as they refused to prove their debts under the commission, the barely being assignees, by an appointment of the majority in value of the creditors, will not determine their election; for they can only be considered as creditors at large, since they have not proved any debt (1). *Ex parte* WARD.

(1) *Ex parte Capot, post.* 219. *Ex parte Dorvilliers, post.* 221. *Ex parte Lindsey, ibid.* 220. *Ex parte Salkeld,* 1 *P. W.* 560. *Vide ex parte Hopkinson, Ves. Jun.* 159.

[154]

Ex parte Lewes. *August the 7th,* 1746.

LORD Chancellor: A petitioning creditor cannot keep the bankrupt in gaol, because he has no election, as a common creditor has; for if he was to elect to proceed at law, the commission must of course be superseded, which would affect those creditors who have proved debts under the commission (1).

Case 93. A petitioning creditor has not the same election as a common creditor; for if he was to elect to proceed at law, it would supersede the commission.

(1) *Ex parte Ward, ante* 153.

Ex parte Hylliard. *August the 3d,* 1751.

Vide under the Division, Commission superseded.

(U) *Rule as to Notes where Interest is not expressed.*

Ex parte Marlar and others. *August the 13th,* 1746.

Vide under the Division, Rule as to discounting of Notes.

(W) *The Construction of the Statute of the 21st of* Jac. 1. cap. 19. *with respect to a Bankrupt's Possession of Goods after Assignment.*

Bourne & al. Assignees of *Peele* a Bankrupt, *v. Dodson.* *December the 5th* 1740.

JOHN Peele was for several years a merchant, and being in 1731 possessed of two ships, the *Diggs* and *Molly*, sent the same loaded with cargoes in his own name, and consigned to his correspondents in *Virginia* or *Maryland*, for return whereof they were to bring back cargoes of tobacco; 514 hogsheads of the said cargoes being consigned to *Peele* in his own right. He upon their arrival possessed himself of the same, and entered them at the custom-house in his own name, and gave his bond for payment of the duties, and lodged the tobaccoes in his own warehouses, and kept the keys, and sold and disposed thereof in his own name, and as his property.

Case 94. Assignment of a ship at sea for a valuable consideration may be good against assignees of bankrupts, tho' no possession is taken thereof; but if of goods at land otherwise.

On the 14th of *February* 1735, *Peele* failed, and a commission of bankruptcy issued against him; *Bourne* and others were chosen

BOURNE v. DODSON.

sen assignees, and at the time of the bankruptcy *Peele* being in possession of the said two ships, and all the cargoe that was unsold, they were seized under the commission; but the defendant insisted he had a right to the said ships, and to the bankrupt's effects in *Virginia* and *Maryland*, for that he had lent *Peele* considerable sums, and that on the 30th of *May*, 1734, there was due to him 10,500*l.* and to secure the payment thereof, *Peele* had by indenture of bargain and sale that very day assigned to him the said two ships, with their tackle and appurtenants, and all other his estate and effects in *Virginia* and *Maryland*, and also several goods sent to *Maryland* on board the said ships, and also to all the tobacco and effects to be by them brought back from *Virginia* and *Maryland* in return for the goods sent, subject to be void on payment of the 10,500*l.* to the defendant, and therefore claimed all the said effects.

The money received from the bankrupt's estate was, by agreement between the plaintiffs and the defendant, paid into the bank, till it appeared to whom the same justly belonged; and the ships were likewise sold, and the money arising from the sale paid into the bank, in the names of the plaintiffs and the defendant *Dodson*.

The plaintiff's counsel insisted, that as *Dodson* did suffer *Peele* to continue in possession of the goods, it was a fraud on the persons who dealt with *Peele*, and that the assignment ought to be set aside, and the defendant come in only as a creditor under the commission, for so much as he shall be able to prove, and receive a dividend *pro ratâ* only with the rest of the creditors.

They also argued, that a mortgagee of goods, though he has advanced the full value for them, and the day of payment is past, yet if he suffers the goods still to continue in the possession of the mortgagor is equally a fraud, as the letting goods lie in a vendor's hands after he has made a bill of sale, or an absolute conveyance of them, and then afterwards becomes a bankrupt, and by considering the case in this light, they endeavoured to bring it within the 10th and 11th clauses of the statute of the 21st of *Jac.* the First, *cap.* 19.

"And for that it often falls out, that many persons, before "they become bankrupts, do convey their goods to other men "upon good consideration, yet still do keep the same, and are "reputed the owners thereof, and dispose the same as their own:

"Be it enacted, that if at any time hereafter any person or "persons shall become bankrupt, and, at any such time as they "shall become bankrupt, shall, by the consent and permission "*of the true owner and proprietary*, have in their possession, order and disposition, any goods or chattels whereof they shall "be reputed owners, and take upon them the sale, alteration, "or disposition as owners, that in every such case the said com-"missioners, or the greater part of them, shall have power to "sell and dispose the same, to and for the benefit of the credit-"ors which shall seek relief by the said commission, as full as "any other part of the estate of the bankrupt."

The defendant's counſel gave it as a reaſon why *Dodſon* choſe rather the goods ſhould ſtill continue in the bankrupt's cuſtody, notwithſtanding he had a ſufficient lien upon them, that he did not care to ſubject himſelf to an account, if he had taken the goods mortgaged into his own cuſtody.

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Lord Chancellor: This is a caſe of a good deal of conſequence, and not without ſome difficulties.

The firſt queſtion is, as to the aſſignment of ſome ſhips and their cargoes by way of ſecurity for a large ſum of money, 10,500*l.* ſaid to be lent at different times by the defendant *Dodſon* to *Peele*, and whether the property of the ſhips and cargoes paſſed thereby?

The ſecond queſtion, whether Mr. *Dodſon* is intitled to retain two bank notes delivered to him by *Peele* the bankrupt of 400*l.* each (1)?

With regard to the aſſignment, it is objected, that it is fraudulent, and did not paſs the property of the goods to the defendant *Dodſon*; for the plaintiffs inſiſt this was an aſſignment of goods without any poſſeſſion, and therefore if aſſignor becomes bankrupt afterwards, that by virtue of the clauſes in the ſtatute of 21 *Jac.* 1. the commiſſioners may ſell them for the benefit of the creditors in general.

The fact is, the greateſt part of *Peele*'s effects at the time of the aſſignment were beyond ſea; now, it would be very detrimental to trade, as it would deter merchants from lending money, if, notwithſtanding they ſhould advance a large ſum by way of mortgage, the property is not altered, but ſubject to mortgagor's creditors under a commiſſion of bankruptcy, unleſs the ſhips return before the commiſſion is taken out, and the effects are in the actual poſſeſſion of mortgagees.

As to the conſtruction of the clauſes in the ſtatute of the 21 *Jac.* it is a point of very great conſequence, and I do not remember in this court, or while I ſat in another, that the conſtruction of theſe clauſes were ever made a point in any caſe.

As to the general caſe, where bills of ſale are made of goods and the purchaſer ſuffers the bankrupt to continue in poſſeſſion, it is plainly within the letter of the ſtatute, but I do not think this can be conſtrued to extend to a bare loan of money upon the goods by way of mortgage, for the words in the clauſe are, goods ſold *for a valuable conſideration*, and *valuable conſideration* is moſt properly applicable to an abſolute ſale.

In the caſe of pawns, which is ſomething like the preſent, the pawnee has only a ſpecial property in them, in caſe they ſhall not be redeemed within the time required.

Pawnee has only a ſpecial property in goods if not redeemed within the time.

According to the original agreement, the defendant *Dodſon* was not immediately to take poſſeſſion of the ſhips and cargoes but at a future day, and if the bankrupt had not a right from the time of the agreement, to exerciſe ſuch a power over them

(1) This money was paid by the bankrupt a few days after the 14 of *Feb.* 1734, when it was alledged, that *Peele* committed the act of bankruptcy; *Dodſon* by his anſwer denied notice of the act of bankruptcy. *Reg. Lib. A.* 1740. *f.* 257

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as he before had, but was now become subject to the mortgage, then this case is not within the clause of the statute.

There is nothing more common than assignments of ships which are out upon their several voyages, as a security for money, and yet the assignee does not look upon it, that he has any property, but the assignor directs the master of the ships as to the voyage, and every thing necessary; and if contracts of this kind had been considered as falling within these clauses, this case must have happened frequently, and would not have been the first time of its being made a point in the courts in *Westminster-hall*.

(a) Vef. 352. Post 161, 170. 180. S. C.

An owner of boys mortgagee them, and after so doing, is suffered by the mortgagee to use them for three years together, and has money lent him upon the credit of being the owner, they are liable to be sold under a commission of bankrupt.

These clauses have never been thought of, till the case of *Stephens* v. *Sole*, before Lord Chancellor *Talbot*, (a) *July* the 6th, 1736. *There a person, owner of three boys belonging to the river* Thames, *mortgaged them, and after he had so done, was suffered by the mortgagee to make use of them in the same manner as before for three years together, and appeared to all intents the visible owner, and persons lent him money upon the credit of his being the owner*, and therefore a very strong case; and Lord *Talbot*, upon these particular circumstances, adjudged it to be within the statute; but as this is only one authority, it would not be at all proper for me to determine a case of such great consequence to trade, without thoroughly considering it; for if it is a void assignment, it is void at law, and then I shall not take upon me in equity, absolutely to decide a matter which is properly triable at law.

On the other hand, it would certainly be of bad consequence, if I should determine this case not to be within the clauses of the statute of the 21 *Jac.* because it must necessarily open a door to fraud, for traders then might borrow money to the full value of the goods, and though the mortgagee suffers them to lie in the hands of the mortgagor, the lender will notwithstanding secure the property to himself, to the prejudice of all the rest of the creditors.

All that remains is, Whether Mr. *Dodson* is intitled to retain two bank notes delivered to him by *Peele* the bankrupt of 400*l.* each.

Where a creditor of a bankrupt has received money of him, and an action is brought by the assignees to recover back such money; they must prove such creditor had notice of the bankruptcy, when he received the same.

Now it is certain, though the act of parliament of the 1 *Jac.* 1. has provided an indemnity for debtors to a bankrupt who pay their money to him without notice of the bankruptcy, yet that statute does not indemnify a creditor of a bankrupt, unless it appears that he had no notice of the bankruptcy at the time of receiving his money.

Where goods are delivered to a creditor after notice of an act of banbruptcy, the proper action for the assignees is trover, because there is a *tort* in detaining, though he came rightfully to the possession of the goods.

The courts of law have considered this latter case as a hard one, and always held the assignees to a strict proof of notice.

The

The next question will be, In what manner it shall be tried? If the assignees in this case bring an action as for goods had and received to the bankrupt's use, the courts at law will nonsuit them, because the property was certainly out of the bankrupt, as they were transferred for a just debt, and therefore the proper action would be trover, because here is a *tort* in detaining of the goods (though he came rightfully to the possession of them), as they were delivered to *Dodson* after notice of an act of bankruptcy, for from that time they became the property of the general creditors (1).

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But if I direct the whole to be tried in trover, it will create a difficulty as to the two bank notes, and therefore it will be better to try it upon a feigned issue.

His Lordship then directed the two following issues:

First, *Whether the defendant* John Peele *became bankrupt on the 14th of* February 1734, *or on any other, and what day?*

Secondly, *Whether at the time of* Peele's *becoming a bankrupt, the two ships,* Diggs *and* Molly, *and the goods in the assignment of the 30th of* May 1734, *or any and which of them were the ships, goods, and chattels of the defendant* Dodson; *and if found that* Peele *became bankrupt any other time than that mentioned in the issue, the same to be indorsed on the* postea, *and all further directions reserved till after trial* (2).

N. B. The parties afterwards compromised it, and the issue was never tried.

(1) See *Billon* v. *Hyde*, *ante* 128. *Brown* v. *Heathcote*, *post.* 160. *Ryall* v. *Rowles*, *post.* 165.
(2) *Reg. Lib. A.* 1740. *E.* 257. See

Ex parte Marsh.

August the 1st, 1744.

Case 95.

Post. 175. S. C.

Marriage without a portion is itself a consideration for an agreement. (1)

MR. *Marsh* a mercer died possessed of goods to the amount of 2000*l.* and upwards, some time after his death, his widow married her husband's journeyman, but before the marriage articles were entered into, reciting that she was entitled to an estate of the value of 600*l.* and upwards, and also reciting that he had taken the money and given a bond for securing the sum of 600*l.* to trustees for her separate use, and that she should have the power to dispose thereof as she should think fit by deed or will, and being also in possession of some plate belonging to her first husband, she had a further power by the articles to sell it, and to pay the money arising from the sale, into the hands of the same trustees for the use of her children by her first husband.

The wife is dead, but before her death executes a deed, and appoints the 600*l.* and also the plate, for the use of her children, to be equally divided between them.

(1) *Brown* v. *Jones*, *post.* 188. 190. *Lancy* v. *Athol*, *post.* 2 vol. 445.

The

Ex parte MARSH.

The second husband is become a bankrupt, and the children of the first applied to the commissioners to be admitted creditors for the 600 *l.* and to have the plate delivered up to them.

The commissioners refused, upon the suggestion of the bankrupt, that he was drawn in, and deceived in the opinion he had of his wife's fortune before the marriage.

The application now on behalf of the children that the plate may be delivered up by the assignees, and that they may be admitted creditors for the 600*l.*

[159] *Lord Chancellor:* Here is a man, of the trade of a mercer, leaves a stock and goods to a considerable value.

This ought to have been divided according to the statute of distributions, one third to the wife, and two thirds to the children, the wife possesses the whole; on her second marriage, in order to provide for the children of the first, she and her husband enter into articles to secure 600 *l.* for her separate use, *&c.* as before stated.

This is in consideration of the marriage, and of the fortune she brought; and, unless some fraud appears, it must have its effect.

No doubt but this is a contract for a valuable consideration; but then it is insisted on, that this man (who was the journeyman to the first husband, and must be presumed to know what were Mr. *Marsh's* effects) was deceived in the opinion he had of Mr. *Marsh's* circumstances, and said by the assignees' counsel, that, if he was defrauded, this is a ground to relieve the bankrupt, and the creditors have a right to stand in his place.

All marriage agreements differ from other agreements, for these do not arise from the consideration of a portion only, but on account of the marriage.

A woman's fortune falling short of the husband's expectations, is no reason for setting aside a marriage agreement.

A man thinks fit to marry a single woman or a widow, and imagines she has such a fortune, and perhaps on a strict account, or by some defective debts, it should fall short, it would be very mischievous to set aside marriage agreements for this reason.

No inventory delivered in to the ecclesiastical court by Mrs. *Marsh*, as administratrix to her first husband, which ought to have been done, as the children were intitled to two thirds. The second husband and his wife possess themselves of all the stock and goods of her first husband, and never make or deliver in any inventory at all, nor did they make up any account by which the children could have what they were intitled to.

If this came before the court in a cause, would they set aside a marriage agreement on such circumstances? They certainly would not.

The plate depends upon another point.

The clause in the 21 *Jac.* 1. which says, *but all goods in the possession of a bankrupt, whereby he gains a general credit, shall be liable to his creditors,* relates to goods the bankrupt has in his own right only.

If this was the plate of the first husband, and came into the possession of the administratrix, or into the hands of the person marrying that administratrix, this certainly is not within

the

the meaning of the statute of the 21 *Jac.* 1. (*which says that all goods in the possession of a bankrupt, whereby he gains a general credit, shall be liable to his creditors*), because here the administratrix had them in *auter droit*, and the husband could have them in no better right, and therefore not at all liable to the debts of the second husband; for the meaning of the statute (if it is possible to put any meaning upon some clauses of this statute, which are very darkly penned) is only with regard to goods the bankrupt has *in his own right* (1). *Ex parte* MARSH.

His Lordship therefore directed the children of the first husband to be admitted creditors under Marsh's *commission for the* 600l. *and the plate to be delivered up to them.*

(1) Vide *Ex parte Ellis*, *ante* 101.

Brown, Assignee of *Roger Williams* a Bankrupt, v. *Heathcote* and *Martyn*. [160]

October the 22d, 1746.

Case 96.

R. W. and his partner gave a bond to H. for 1200*l*. and the same day by deed assigned to H. or order, the goods in two ships then at sea, and also 13 bills of lading, and policies of insurance, containing the said goods as a collateral security; the latter indorsed to H. the former not. The bill brought by the assignee of R. W. now a bankrupt, for these goods, insisted that *R. W.* acted as the visible owner of the ship and cargo, being not put into the possession of *H.* and therefore the plaintiff intitled thereto for the benefit of the creditors at large. The court of opinion that every thing which could shew a right to the ship and cargo being delivered over to *H. R. W.* could no longer be said to have the *order and disposition* of them, and therefore not within the meaning of the 21 *Jac. cap.* 19. and consequently *H.* has a right to retain the ship and cargo, till the principal sum of 1200*l*. and interest is satisfied (1).

ROGER *Williams*, and his partner *Jeremiah Wilder*, gave a bond to the defendant *Heathcote* for 1200*l*. and on the same day executed a deed of assignment, by which it was agreed, if default should be made in payment of the money advanced by *Heathcote*, *Williams* and *Wilder* should make over to the defendant *Heathcote* or order, the goods in the two ships *Samuel and Molly*, and *Anne Billander*, together with the bills of lading, which might be the proceed of the returns of the said goods and cargo for any port in *England*, and that should be consigned to *Williams* and *Wilder*, and that they should put *Heathcote* in possession thereof; and they also covenanted that after receiving advice from beyond sea of any goods, that they would acquaint the defendant *Heathcote* with it, and impower him to dispose of the same, and keep the money arising from thence in satisfaction of his bond, and if there should be any overplus, to pay it to *Williams*.

Roger Williams did accordingly assign over to the defendant *Heathcote thirteen bills of lading*, and several *policies of insurance*, containing the goods in the ship *Samuel and Molly*, as a collateral security for the sum of 1200 *l*. the latter were indorsed to the defendant *Heathcote*, but the former were not.

(1) So *ex parte Mathews*, 2 *Ves.* 272. *Atkinson* v. *Malings*, 2 Durn. & East 462. *Lempriere* v. *Pasley*, *ibid.* 485. *Ex parte Batson*, 3 Bro. Cha. Rep. 302. *Secus* if the creditor suffer the ship to come back, and go upon another voyage. *Ex parte Mathews*, 2 Ves. 272. *Hall* v. *Gurney*, 1 Cooke's B. Laws, 380. *Vide ex parte Stadgrom*, *Ves. Jun.* 163.

At

Brown v. Heathcote.

At the time of these transactions between *Williams* and *Heathcote*, the ship was at sea in a voyage to *Guinea*.

The bill is brought for these goods by the plaintiff as the assignee of *Roger Williams*, who is now become a bankrupt.

The assignment to *Heathcote* bears date the 10th of *Jan.* 1736.

The ship *Samuel and Molly* came home the 19th of *July*, 1738.

The commission of bankruptcy against *Williams* issued the 27th of *October*, 1738.

Roger Williams was found a bankrupt as far back as *November*, 1737.

A separate commission of bankruptcy has been also taken out against *Jeremiah Wilder*.

The counsel for the plaintiff insisted, that this assignment to *Heathcote* will not bind the creditors under the commission, as *Roger Williams* the assignor acted still as the visible owner, for the ship and cargo were not put into the possession of *Heathcote*; and therefore the plaintiff, as the assignee under the commission of bankruptcy against *Williams*, is intitled to the cargo for the benefit of the creditors at large.

[161]

For the plaintiff was cited the case of *Bourne*, assignee of *Peele* a bankrupt, v. *Dodson*, (*a*) the 4th of *December* 1740, and of *Ryal* v. *Stevens*, *March* the 10th, 1743, and the case of *Stevens* v. *Sole*, (*b*) before Lord *Talbot*, who was of opinion that an assignment of barges by a person, who, notwithstanding such assignment, kept possession of these barges, and worked them, was a fraud on his creditors at large, and therefore decreed the barges to be the property of those creditors, and lawfully seized under the commission against the assignor.

(*a*) S. C. *ante* 154.

(*b*) 1 *Ves.* 352. *ante* 157. S. C.

A. being indebted to *B.* assigns over barges to *B.* who suffers *A.* to keep the possession, this is a fraud on the creditors at large, and the barges may be seized under a commission of bankruptcy taken out afterwards against *A.*

Mr. *Noel* for the defendant *Heathcote*.

At the time of the assignment the ships were actually sailed and gone abroad, and therefore the delivery of the ships and cargoes to the defendant *Heathcote* was impossible. In the case of *Bourne* v. *Dodson*, your Lordship doubted whether the statute of the 21 *Jac.* 1. *c.* 19. extended to a mortgage of goods, and was rather inclined to think the act confined it to an absolute sale (1).

The case of *Ryal* v. *Stevens* was an assignment of a brewhouse and utensils here in *England*; so that the possession there was capable of being delivered, and consequently different from the present.

Stevens v. *Sole* is also different, for the barges were actually worked in the river *Thames*, and therefore the possession of them might likewise have been delivered.

He further insisted this was an actual assignment, the policies of insurance being indorsed to the defendant *Heathcote*.

Mr. *Wilbraham* of the same side argued.

That such a contract as the defendant made with *Williams* was a perfect and compleat sale, without the delivery of the goods.

(1) See *Ryal* v. *Rolle*, *post.* 165.

That if it was not a legal assignment, yet the defendant had an equitable lien upon the goods, by virtue thereof, and had a right to retain them against the plaintiff as an assignee under the commission of bankrupt against *Williams*; and in support of this cited *Taylor* v. *Wheeler*, 2 *Vern*. 564. BROWN v. HEATHCOTE.

Lord Chancellor: In the extent in which this case has been argued at the bar, it is a question of very great consequence.

But I would observe in the first place, this is a case which has come seldom before the court, and much stronger in favour of the defendant than such cases generally are.

For the common cases are, where the creditor has pretended to set up a demand for an old debt, and the person owing has at that time been in declining circumstances; and this creditor, in order to gain a preference, has procured an assignment of goods from the debtor, who soon after becomes a bankrupt; yet even in some of these cases, if the creditor appears to be a *bona fide* one, he has prevailed, though the court leans strongly against such a creditor in favour of the creditors at large.

Here the bond to the defendant *Heathcote*, and the assignment, bear date the same day; therefore this case stands clear of any colour of fraud, with a view to gain to himself a preference to other creditors. I mention this to shew in how much more favourable a light this defendant stands than in the common cases. [162]

The case of *Jacobs* v. *Shepherd*, that was originally heard before Sir *Joseph Jekyll*, was an assignment of goods, which at the time of the assignment were actually beyond sea, and yet Sir *Joseph* set it aside, as the borrower was then in failing circumstances; but Lord Chancellor *King* upon an appeal reversed the decree at the Rolls (1).

Where there is an assignment of an outward bound cargo, it is a compleat contract, tho' the cargo is not delivered to the assignee.

I will first consider the case on general rules both of law and equity.

It has been insisted by the plaintiff's counsel, that this assignment to *Heathcote* is no legal bill of sale, or legal assignment to him of these goods.

And it must be admitted, as to the homeward bound cargo, it is no legal assignment.

But it has been carried still further by the plaintiff's counsel, for they have likewise insisted the assignment does not amount to a bill of sale of the outward bound cargo, for want of a delivery of the goods themselves to the defendant *Heathcote*.

I am of opinion that a delivery in this particular instance was not absolutely necessary to make it a compleat contract; as in the case of a horse sold in a market overt, if the buyer pays the money for him, he may maintain an action against the seller, without shewing a delivery of the horse. It is true, the want of a delivery is often an objection, and a material one, but how? Why as a badge of fraud; for where a subsequent creditor has taken the goods in execution, a prior creditor must shew a delivery, as in *Twine*'s case, 3 *Co*. 80.

(1) This case is cited in *Small* v. *Oudley* 2 *P. W*. 431. and more fully by Lord *Mansfield* in 1 *Burr*. 478.

Brown v. Heathcote.
Indorsing bills of sale does not amount to an assignment, unless the goods are directed to be delivered to the assignee.

But it has been also insisted on the part of the plaintiff, that there are no proper words of assignment in the deed; I am so far of opinion with the plaintiff, that what has been done in this case does not amount to a sufficient legal sale. Even if there had been an indorsement of the bills of lading, it is no actual assignment, unless the goods were directed to be delivered to the assignee.

Assignees under commission of bankruptcy take subject to all equitable liens against the bankrupt himself.

But then the question will come to this, whether the defendant *Heathcote* hath not a sufficient lien upon the goods in point of equity? for it has been truly said, that assignees under a commission of bankruptcy must take subject to all equitable liens against the bankrupt himself. The case of *Taylor* v. *Wheeler* is exactly in point. 2 *Vern.* 564.

Assignments of choses in action for a valuable consideration, are good against creditors under a commission of bankruptcy.

In the case of *Cock* v. *Goodfellow*, *Trin.* term the 8th of *Geo.* 1. Ld. *Macclesfield* was of the same opinion (1). The ground the court goes upon is this; that assignees of bankrupts, though they are trustees for creditors, yet stand in the place of the bankrupts, and they can take in no better manner than he could; therefore assignments of choses in action for a valuable consideration have been held good against such assignees.

If this is an assignment therefore for a valuable consideration, it will prevail in equity in favour of the defendant *Heathcote*. It is very true, the deed is not an actual assignment, but yet there is sufficient upon the face of it to shew, that *Heathcote* had a charge and lien upon the goods, by virtue of the loan of the 1200 *l*. [163]

The policies of insurance have been indorsed to him, though the bills of lading and invoices have not.

I will first consider the case on general rules of equity.

Suppose *Roger Williams* had declared only by the deed, that though he kept the possession of these goods, they should still remain as a collateral security to the defendant *Heathcote*, it would have been an equitable lien.

It has been further objected by the plaintiff's counsel, that all this was executory only, and no lien gained till the goods came home.

This is by no means a necessary consequence from the clauses in the deed, and besides there is one clause which expressly enables *Heathcote* to sell and dispose of such effects, and keep the money arising thereby in satisfaction of his bond, upon returning the overplus to *Williams*.

Therefore taking into consideration the whole of this deed, it amounts to an equitable lien upon these goods, as a covenant to execute a power is considered as done. *Vide* Ld. *Coventry*'s case. (*a*) And I am of opinion, as this appears to be a fair transaction, and money actually paid, and not an old creditor endeavouring to get an undue preference, that it ought to be supported in equity.

(*a*) S. C. 2 *P. W.* 221. 1 *Stra.* 596. 9 *Mod.* 12. *Mac.* in *Eq* last case.

I shall, in the second place, consider what has been urged by plaintiff's counsel upon the clauses in the 21 *Jac. c.* 19. that these goods, by virtue of that statute, are vested in the assignees

(1) 2 *P. W.* 430. 10 *Mod.* 489. 1 *Burr.* 478. S. C.

of

of the bankrupt, for want of the delivery of them to the defendant *Heathcote* by *Roger Williams*, and that the defendant can only come in as a creditor under the commission, and is not intitled to retain them till his whole 1200*l.* is satisfied. **Brown v. Heathcote.**

It has been insisted, that as there was no indorsement of the bills of lading and invoice to the defendant *Heathcote*, they were left under the sole direction and disposition of the bankrupt; and therefore are subject to the clauses in the act of parliament.

If this doctrine should prevail, it would be attended with the most mischievous consequence.

There has been no determination upon these clauses, so that according to the rule in respect to laws in other countries, they might be said to be gone into desuetude.

Such a construction would bind up property, so that it would be a great detriment to trade and commerce in general.

I do not think these clauses were ever meant to extend to mortgages or pledges for money or goods, because it is impossible in an assignment of goods beyond sea, that they can be delivered over to the assignee.

"If any person shall become bankrupt, and, at such time as "they shall so become bankrupt, shall, by the consent and per- "mission *of the true owner and proprietary*, have in their *possession*, "*order, and disposition*, any goods whereof they shall be *reputed* "*owners*, and take upon them the sale, alteration, or disposition "as owners, that in every such case the said commissioners shall "have power to sell and dispose the same to, and for the be- "nefit of the creditors, which shall seek relief by the said com- "mission, as fully as any other part of the estate of the bankrupt." Clause of the statute in question. [164]

The act does not confine it merely to having the goods left in *their possession*, but also the order and disposition thereof, which is explained by the words that follow, "*whereof they shall be reputed owners*."

To apply this to the present case.

With regard to the ship, there is no colour to say it was so left in *Williams*'s possession, as that he could take upon him *the order and disposition thereof*.

Consider it in the other respects.

The bills of lading and invoice were delivered by *Williams* to *Heathcote*, so that every thing which could shew a right to the goods was delivered over to *Heathcote*; then how could *Williams* be said to have the order and disposition of them?

I am of opinion therefore upon the whole, that this is not within the meaning of the act of parliament of the 21 *Jac.* 1. without entring into the nicety of the words *true owner and proprietary*, and I do agree with Mr. *Wilbraham*, that in this court the mortgagors, as having much the largest share in the estate, are considered as *owners* and having the property in it; and for that reason mortgages are not within the intention of this act (1).

Let it be referred to the Master, to take an account of what is due to the defendant, for the sum of 1150*l.* part of the sum

(1) See *Ryall* v. *Rolle*, *post*. 164.

 of

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of 1200*l.* mentioned in the condition of the bond dated the 10th of *January* 1736, and in the indenture of the same date, and also for the sum of 25 *l.* afterwards advanced by him, upon an insurance of the goods mentioned in the said indenture, together with interest for the same, at the rate of 5 *per cent. per ann.* and the defendants *Heathcote* and *Martin* are to come to an account before the Master for the goods and effects, part of the cargoes of the two ships called the *Samuel and Molly* and *Ann Billander*, and the produce of the said ships, and what shall be coming on the said account of the said goods and effects, and also the produce of the said ships is to be applied in the first place, in payment of what shall be found due to the defendant *Heathcote* for his principal, interest, and costs, and to the defendant *Martin* for his costs; but in case the money that shall be coming on the said account of goods and effects, and also of the produce of the said ships, shall not be sufficient to pay unto the said defendant, what shall be found due to him for principal, interest, and costs as aforesaid, then the said defendant *Heathcote* is to be at liberty to come in for the residue, as a creditor under the respective commissions awarded against the said *Roger Williams* and *Jeremiah Wilder*, and to receive a dividend in respect thereof, in proportion with the other creditors.

[165]

January the 27th, 1749.

Sir *Matthew Ryall* and others, Assignees of *William Harvest* a Bankrupt, — — Plaintiffs.

Case 97.

Rolle Executor of *Jonathan Stephens*, and others, Defendants.

1 Vez. 348. pl. 169, 375. pl. 170. S. C.

Upon the construction of 21 *Jac.* 1. *cap.* 19. *s.* 11. determined by Lord Chancellor, that if a person advances money upon a conditional sale of goods, and does not insist upon a delivery thereof, he confides in the credit of the vendor, and not on any real or particular security, and ought to come in under a commission of bankruptcy against the vendor, as much as any other person that places a confidence in the bankrupt personally.

LORD *Hardwicke Chancellor*, assisted by *Sir* William Lee *Lord Chief Justice of the court of King's Bench*, *Sir* Thomas Parker *Lord Chief Baron of the court of Exchequer, and Sir* Thomas Burnet *one of the justices of the court of Common Pleas.*

Mr. Justice *Burnet*: *William Harvest*, a trader within the bankrupt acts, being indebted to *Benjamin* and *Joseph Tomkins*, did by indenture of the 2d of *June*, 1732, demise his house, brewhouse, and out-houses, and coppers and utensils fixt, or belonging to the brewhouse, for a term of 500 years, redeemable upon payment of 1500 *l.* and interest.

On the 15th of *October*, 1736, *Harvest* entred into partnership with *Jonathan Stephens* deceased, to whom *Rolle* the defendant was executor, and the utensils and stock in trade were appraised at 14,000 *l.* and *Harvest* conveyed one moiety thereof to *Stevens*; they carried on the trade jointly till the 26th of *June*, 1740, when *Harvest* became a bankrupt.

On the 24th of *December*, 1736, *Harvest* in consideration of 4000*l.* did, by way of securing the same, assign over his moiety of the utensils and stock in trade to one *Potter* in trust for *Stevens*, and there was a clause in that mortgage to secure any sums that should be afterwards lent.

Sir *Thomas Reynell* having entered into two bonds as a surety for *Harvest*, he on the 10th of *December* 1737, in consideration of

of 1000 *l.* assigned one seventh of his moiety of the partnership stock, *&c.* to Sir *Thomas Reynell*, with a defeazance to be void upon his indemnifying him against the bonds: the house and brewhouse, with the out-houses, had been mortgaged to the *Tomkins's* in 1725, for securing 1200 *l.* and in 1731 this mortgage was assigned over to one *Baugh*, who in *November* 1736 reconveyed all the utensils to *William Harvest* the bankrupt. RYALL *v.* ROLLE.

By indentures of lease and release bearing date the 6th and 7th of *September*, 1738, *Baugh* in consideration of the principal money, by the direction of *Harvest*, assigned over his mortgage to *Stevens*, and *Harvest* assigned over a moiety of the utensils, as a collateral security; upon this mortgage 2355 *l.* is due, *so that it is plain, that this mortgage will be preferred, as to the real estate, to the* Tomkins's, *but their mortgage will be preferred as to the collateral security of the utensils:* the last mortgage is of *William Harvest* to his son *George*, dated the 6th of *March*, 1738-9, of one seventh part of his stock, *&c.* for 1000 *l.*

The question is, Whether all, or any, and which of these mortgagees will be intitled to resort to the utensils, *&c.* for a satisfaction, or whether they must come in under the commission? And it depends upon this, Whether these mortgagees or any, and which of them, did not so permit the bankrupt to continue in possession, as to be within the express words of the statute of the 21 *Jac.* 1. *cap.* 19? I will consider this question in three lights. [166]

First, The nature of a mortgage or conditional sale of specifick goods or things in possession, (of which there might have been an actual delivery), where the bankrupt is suffered to continue in possession till his bankruptcy, and whether there is any difference betwixt such a mortgage, when made to a stranger or when made to a partner?

Secondly, The nature of three of these mortgages to strangers, as sales partly of things in possession, as utensils, *&c.* and partly of choses in action, as debts and profits in trade.

Thirdly, Whether there will be any difference as to the general rule, betwixt such a mortgage made to a partner, and made to a stranger.

Although the present question must be determined upon the construction of the statute of the 21 *Jac.* 1. yet it is necessary to consider the conditional creditors as to their debts before that statute; but it is previously necessary to clear the case of arguments drawn from the nature of pawns, which are foreign to the present question.

It is contended that pawns among the *Romans* required a delivery, but that mortgages did not.

As to the *Roman* law, there was an authority cited from *Just. Inst. lib.* 4. *tit.* 6. *sec.* 7. *Nam pignoris appellatione eam proprie rem contineri dicimus, quæ simul etiam traditur creditori, maxime si mobilis sit; at eam, quæ sine traditione nuda conventione tenetur, proprie hypothecæ appellatione contineri dicimus.* If this passage stood alone, it might go a great way to prove what it was cited for: but when I produce authorities to shew that *pignus* is as valid without

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without a delivery as with one, it must be allowed that these passages have been so interpreted, that *pignus* can only be of goods capable of delivery, and *hypotheca* of goods not capable of delivery. *Domat. l.* 1. *c.* 1. *s.* 1. *Wood, lib.* 3. *cap.* 2. *p.* 219. *Dig.* 50. *t.* 16.

Delivery is then not of the essence of a pawn in the *Roman* law; and other countries adopting the *Roman* law have corrected this, that if a pawn be not delivered, it shall not affect a purchaser for a valuable consideration: but if this had been the true distinction, it would have no influence unless the *Roman hypotheca* and an *English* mortgage were of the same nature, which they are not; for an *hypotheca* gave only a lien and no property, with a right to be satisfied on failure of the condition; a mortgage with us, is an immediate conveyance with a power to redeem, and gives a legal property.

If a man gives an *hypotheca* or *pignus* with a condition, that if the money is not paid at a day, the pawnee shall enjoy the goods at such a price, that is not in the nature of a pawn, but a sale. *Just. Cod. l.* 4. *t.* 54. *s.* 2. *Si fundum parentes tui ea lege vendiderunt : [ut] sive ipsi, sive hæredes eorum emptori pretium quandocunque, vel intra certa tempora obtulissent, restitueretur; teque parato*
[167] *satisfacere conditioni dictæ, hæres emptori non parit, ut contractus fides servetur, actio prescriptis verbis, vel ex vendito tibi dabitur : habita ratione eorum, quæ post oblatam ex pacto quantitatem ex eo fundo adversarium pervenerunt.* This is the description of an *English* mortgage in the *Roman* law, and as to the sale of moveables, *Cod. l.* 4. *t.* 54. *s.* 7. *Si à te comparavit is, cujus meministi, & convenit, ut si intra certum tempus soluta fuerit data quantitas, sit res inempta, remitti hanc conventionem rescripto nostro non jure petis. Sed si se subtrahat ut jure dominii eandem rem retineat : denunciationis et obsignationis depositionisque remedio contra fraudem potes juri tuo consulere.*

All that can be argued from the *Roman* law with regard to pawns will be foreign to the question, and so will what may be argued from the *English* law with regard to pawns, for delivery is of the essence of an *English* pawn, 5 *H.* 7. 1. *Bro. Title Pledges, pl.* 20. *Title Trespass, pl.* 271. and 2 *R. Rep.* 429. and no authority contradicts these resolutions.

2 *Leon.* 30. and *Yelv.* 164. are both cases not of pawns but of bailments to a third person, to sell for the use of creditors: and it is true, that, in these cases, the creditor will have an interest in the performance of the contract, and may sue the baillee.

There is scarce any book that treats upon pawns, but considers them as in the possession of the pawnee; as where it is debated whether a pawn may be used; and the difference laid down between a pawn and a distress is, that a distress may not be used, because the party in that case comes into possession by act of law, and in the other by the act of the party. *Owen* 124. 2 *Raym.* 917. *Salk.* 522. *Coggs* and *Bernard.*

The distinction between mortgages and pawns is laid down in *Noy* 137, and in *Cro. Jac.* 245. 1, *There is a difference between*

mortgaging

mortgaging of lands and pledging of goods; for the mortgagee has an absolute intereſt in the land, whereas the other has but a ſpecial property in the goods to detain them for his ſecurity. *Per Fleming* Ch. J. *et al'*, Sir *John Rotcliffe* verſ. *Davies*. Ryall v. Rolle.

2. *Yelverton* 178. The delivery is nothing but the bare cuſtody, and it is not like to a mortgage; for then he that has the intereſt ought to have the money, but in the caſe of a pledge, it is only a ſpecial property in him that takes it, and the general property continues in the firſt owner, upon tender of the money ſecured by the pawn, by the pawner, the property notwithſtanding the refuſal, is reduced conſtantly to the pawner without claim. S. C. 2 *Bulſt.* 30.

The next queſtion to be conſidered, will be in relation to the condition of creditors where the debtor continues in poſſeſſion of the goods mortgaged: this was fraudulent at common law, and the 13 *Eliz. cap.* 5. *ſec.* 1. 2. provides againſt it, *that it ſhall be void.* There is no diſtinction whether the ſale be abſolute or conditional: courts of equity and juries are to conſider upon the whole evidence whether the conveyance was made with a view to defraud or not. [168]

This act does not extend to conveyances upon good conſideration, unleſs the circumſtances have the appearance of a deſign to deceive creditors; but where the goods or deeds have been left with the vendor ſo notoriouſly, as that there could be no deſign to defraud, this has never been looked upon as fraudulent.

Twine's caſe, 3 *Co.* 80. is a leading caſe upon fraud on this act; the tranſaction there was held fraudulent, though upon good conſideration, for that it was not *bonâ fide*, becauſe the vendor was left in poſſeſſion, and traded upon the credit of the goods ſold: it is hard to aſſign a reaſon why a buyer ſhould leave goods in the hands of the ſeller, unleſs to give him a falſe appearance of circumſtances and credit.

It was inſiſted, that there were ſeveral caſes that had made a diſtinction as to the poſſeſſion, after a conditional ſale, betwixt ſuch conditional and an abſolute conveyance of lands and goods.

I will ſhew that the caſe of lands is not applicable.

2 *Bulſt.* 226. 1 *Ro. Rep.* 3. reſolved, That the grantor's poſſeſſion of the land was not fraudulent; but Lord *Coke* ſaid, That if the grantor had continued in poſſeſſion of the original leaſe, that would have made it fraudulent.

Poſſeſſion can be no otherwiſe a badge of fraud, than as it is calculated to deceive creditors: as to the poſſeſſion of goods, I have no way of coming to the knowledge of the owner, but by ſeeing who is in poſſeſſion of them; but the poſſeſſion of land is of a different nature, for a man may be in poſſeſſion of lands, as a tenant at will, as a mortgagor is, to the mortgagee, before the condition broken.

A purchaſer may call for the title deeds, and need not be deceived unleſs he will: but this is not the caſe of goods, where they are left in the poſſeſſion of the ſeller: a ſecond mortgagee ſhall never be compelled to diſcover his title, 3 *Will.* 230. (a) becauſe

(a) Head v. Egerton.

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because the first mortgagee has contributed to draw him in by leaving his title deeds in the mortgagor's hands.

There may be a case as in *Eq. Caf. Abr.* 321. *pl.* 7. where leaving title deeds with the mortgagor will not be construed as a badge of fraud, on account of the particular circumstances (1*).

(a) Bucknal v. Roiston.

A case was cited *Pr. Ch.* 285 (*a*). There a supercargo, having shipped goods of his own, borrowed money at 40 *per cent.* and made a bill of sale of the goods to the plaintiff; the goods were carried and sold abroad; and upon a question betwixt the particular vendee of these goods, and a judgment creditor of the vendor's, Lord *Cowper* decreed in favour of the vendee; he took no distinction betwixt conditional and absolute sales, but founded his determination upon the fairness of the transactions; his words are, "That here was no possession calculated to acquire a "false credit," which is a plain declaration that a possession so calculated as to acquire a false credit, would have made the transaction void. There is a further saying in the report, that it is true, in case of a bankrupt, such keeping in possession after a sale, will make the sale void.

[169] This must mean such possession as would give a false credit, and all that is laid down there is, that a possession to acquire a false credit, would make such a transaction void, otherwise not.

Maggot and *Wills*, 1 *Raym.* 286. and cases in the time of King *William* the Third, 159. From both these reports it appears, that the case was so defectively stated, that the court could form no judgment upon it, but sent it back again for a new trial, and the *dictum* of Lord Chief Justice *Holt* is against the case, for which it was cited; no notice of the statutes of bankrupts was taken in the whole case; but *Holt* takes it up, upon the fraud, and gives it as his opinion, that it was not fraudulent, and it is very clear, that it was not the distinction betwixt a conditional and absolute sale which weighed with him at all. He distinguishes betwixt a bill of sale to a landlord, and to any other creditor; so that it was his opinion, that it was not fraudulent in the case of a landlord. From all these cases it appears, that upon the construction of the statute of the 13th of *Eliz.* there is no room to make a distinction betwixt conditional and absolute sales of goods, if made to defraud creditors, but a court or jury are left to consider of this from the circumstances of the case.

The legislature have thought necessary to describe what goods were a bankrupt's or not, and for this purpose the 21st of *Jac.* 1. was made, and by that act the tenth section, which is the preamble to the eleventh section, though it is printed with the former section, by mistake, says, "And for that it often falls out "that many persons, before they become bankrupts, do convey "their goods to other men upon good consideration, yet still do "keep the same, and are reputed the owners thereof, and dispose "the same as their own."

Now merely considering things in possession, the mischief was, that these persons, before the act, made over their goods, and yet were suffered to continue in possession, as if the goods

(1*) *Petter* v. *Russell*, 2 *Vern.* 726. S. C. See also the case of *Tourle* v. *Rand*, 2 *Bro. Rep.* 650.

were

were ſtill their own; and this was the thing intended to be remedied, and there is no diſtinction made here between abſolute and conditional ſales. Ryall v. Rolle.

Then conſider the enacting clauſe.

"Be it enacted, that if at any time hereafter any perſon or "perſons ſhall become bankrupt, and, at ſuch times as they "ſhall ſo become bankrupt, ſhall, by the conſent and permiſſion "of *the true owner and proprietary*, have in their poſſeſſion, order, "and diſpoſition, any goods or chattels whereof they ſhall be re-"puted owners, and take upon them the ſale, alteration, or diſ-"poſition as owners, that in every ſuch caſe the ſaid commiſ-"ſioners ſhall have power to ſell and diſpoſe the ſame, as fully "as any other part of the bankrupt's eſtate."

It is not to be doubted but as the preamble makes no diſtinction betwixt abſolute and conditional ſales, ſo the enacting clauſe will take in the one, as well as the other.

The only thing contended for is, whether the mortgagee ſhall be conſidered as the *true owner*, or the mortgagor, and there is no doubt the conditional vendee is *the true owner or proprietary*, and [170] there is no reaſon to make a diſtinction between an abſolute and conditional vendee, but by confounding the difference betwixt pawns and mortgages.

There might ſome doubt ariſe, if this was the caſe of a pawn, as in the caſe 3 *Bulſtr.* 17. but it cannot be doubted in the caſe of a mortgage, for it is an immediate ſale to the mortgagee; and tho' the mortgagor may buy it again, or redeem by favour of a court of equity, yet, till then, the vendee is the abſolute proprietor.

On a pawn, the pawn is complete by a delivery; but on a conditional or abſolute ſale, the ſale is compleat by the contract, and the party is intitled to a delivery of the goods as ſoon as he has paid the price. *Salk.* 113. *Dyer* 20. 203.

If therefore a conditional vendee pays money, and does not inſiſt upon a delivery of the goods, he confides in the credit of the vendor, and not in any real or particular ſecurity, and ought to come in, under the commiſſion, as much as any other perſon that places a confidence in the bankrupt, and not in any other ſecurity.

As there is no authority to warrant a diſtinction betwixt abſolute and conditional ſales, ſo there is a caſe that deſtroys it. *Stevens* v. *Sole* in *Chanc. Trin.* 1736 (a). A trader within the ſtatute having poſſeſſion of a leaſehold eſtate, aſſigned it, and made a bill of ſale of three hoys redeemable. In *May* 1731 he became a bankrupt, the defendants were the aſſignees, and the plaintiff brought a bill to be paid his principal, &c. or to foreclose; and it was admitted that the leaſehold was inſufficient to pay the plaintiff, but as to the hoys, it was inſiſted that as the bankrupt had continued in poſſeſſion of them, they were liable to the commiſſion.

(a) Ante 157. 161. 1 Veſ. 352.

Lord *Talbot* decreed upon this admiſſion, that there ſhould be a foreclosure as to the leaſehold, and that the plaintiff ſhould be admitted under the commiſſion, for ſo much of his debt as the leaſehold would not ſatisfy; and decreed that the money ariſing

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arising by the sale of the hoys should be applied to the payment of the creditors under the commission.

But it was insisted, that there has been a subsequent case contrary to this, *Bourne*, assignee of *Peele* v. *Dodson*, *Dec.* 4, 1740, in Chancery (*a*). It is sufficient to say there was in that case no judicial determination. *Lord Chancellor* did then consider the inconveniences that might arise, if it should be held that ships at sea, of which no possession could be delivered till their return, should be subject to a bankruptcy.

(*a*) Ante 154. 1 Ves. 361.

There was another case before Lord *Hardwicke*, *October* 22, 1746. *Brown* v. *Heathcote* (*b*). *Williams* and *Wilder*, partners, indebted to *Heathcote* in 1200 *l.* assigned their ships to him, and delivered over the charter-party, invoice, &c. *Williams* became a bankrupt, and the ships came home, and it was contended that as here was no delivery of the possession, it was within the statutes; but Lord *Hardwicke* was of a contrary opinion, as every evidence of ownership was delivered over to the assignee, and all means were used to obtain an actual delivery as soon as the ships came home; and that the statute was designed against those only, who had neglected some act to put themselves in possession of the goods conveyed, and by that means had led other people into a deceit; that there could be no *consent or dissent*, as to the possession of ships at sea, and so not within the words of the act, nor within the reason of it, which was to hinder persons from gaining a false credit, for here the owners had delivered over every evidence of ownership, and could not prove by any other means that they were owners.

(*b*) Ante 160. more fully stated.

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I should think that the delivering over of the muniments was a delivery of the ship, as the delivery of the keys of a warehouse is a delivery of the goods in it.

Now to apply this to the two mortgages.

That of *Tomkins* in 1723.

And that of *Stephens* in 1738.

These mortgages are of a lease with fixtures and moveable goods; as to the fixtures, no body can remove them till the mortgage is satisfied, for though a lessee may remove fixtures during his term, yet if he leases his whole term, he cannot, any more than a lessor during the term, and a sheriff may take them in execution. *Salk.* 368. *Poole's case.*

As to the utensils *not fixed*, they will come under the same consideration as goods granted without a delivery of possession.

A lease of an house with moveables, is only a gift of the utensils during the term. *Spencer's case*, 5 *Co.* 16, 17. 1 *And.* 4. *Dy.* 212. *b.*

2. As to the fixtures, we need not consider them with regard to the mortgage in 1738, because they will be exempted by the first mortgage; but as to the utensils *not fixed*, they will stand in the same condition as others.

A partner is possessed *per mie & per tout*, (1) and therefore no actual delivery can be made to him; but the offence against the statute is permitting one to continue in possession, when he has sold all the goods to another, who is thereby intitled to the

(1) *West* v. *Skip.* 1 Ves. 242.

the poſſeſſion of the entirety; and *Stevens* permitting *Harveſt* to continue as half owner of them, is the caſe mentioned in the ſtatute. RYALL *v.* ROLLE.

As to the mortgages of one-ſeventh ſhare of the bankrupt's moiety of the partnerſhip ſtock, *&c.* in trade, before I go into the conſideration of this, I will conſider the caſe of an aſſignment of a mere *choſe en action*.

The ſimpleſt caſe is of a bond; ſuch *choſe en action* is aſſignable in equity, and not at common law. The reaſon is, becauſe the aſſignor can furniſh the aſſignee with all the means of reducing it into poſſeſſion, for he can let him ſue in his name; why therefore is not the means of reducing any thing into poſſeſſion as neceſſary, as the delivery of the thing itſelf in the other caſe? Suppoſe a trader aſſigns over a bond, and the aſſignee permits him to keep the bond in his poſſeſſion, why ſhould not that be within the miſchief of the ſtatute?

A bond debt is a chattel, though ſome doubt has been made of this; but the doubt ariſes from hence, not that they are not chattels, in their nature, but that they are not grantable to a common perſon; but if they were granted to the king, they would paſs as chattels. *Bro Prerogative*, 10. 3 *Inſt.* 55. [172]

12 *Co.* 1. *Ford* and *Sheldon's* caſe, the reſolution there is, that perſonal actions are as well included within the word goods, as goods in poſſeſſion; therefore if a bond is a chattel, and the aſſignment is a conveyance of it, the bond being left in the hands of the aſſignor, is in his poſſeſſion, and he may aſſign it to a ſecond aſſignee, or may ſhew it to any creditor, as an evidence of ſo much money owing to him, and deceive him by it. And as he can have it by no other means, but by the conſent of the *true owner* in equity, he may thank himſelf for it.

In mortgages of lands poſſeſſion need not be delivered, but the title deeds muſt; and ſo ſhould the deeds and ſecurities of *choſes in action*. It is ſaid that a debt in trade is a mere choſe in action, and will paſs by an aſſignment even the day before the aſſignor becomes a bankrupt, as in the caſe of *Small* and *Oudley*, 2 *Wms.* 427. Mr. Juſtice *Burnet* ſtated this caſe, and the reaſon of the judgment.

An obſervation was made, that this was an aſſignment of a ſhare in another man's trade, and not in his own; and the only reaſon of it might be, that here he could give no poſſeſſion. And a ſtreſs was laid upon this.

Every man in his own trade is in poſſeſſion of the choſes in action that ariſe from his own goods, and can put another in poſſeſſion either by giving him the ſecurities, or by admitting him a partner for ſuch a ſhare. And it is no uncommon thing to argue againſt aſſignees of a bankrupt from the nature of the goods, in reſpect to the choſes in action ariſing out of them, and alſo in reſpect to the new goods or profits. And if this kind of argument will prevail againſt them, it ought to prevail in their favour.

Suppoſe goods are conſigned to a factor who ſells them, and breaks, the merchant for the money muſt come in as a creditor under the commiſſion; but if the money is laid out in other goods, theſe goods will not be ſubject to the bankruptcy.

1 *Salk.*

RYALL v. ROLLE.

1 *Salk.* 160. Suppose, instead of selling the goods for ready money, he sells for money payable at a future day, and breaks before the day, if the assignees receive the money, it will be for the use of the merchant. Or suppose that the factor had taken notes for the goods, if his assignees receive the money upon these notes, it will be to the merchant's use. This was determined in the court of Common Pleas. *Salmon* and *Scott*, *Hil.* 16 *G.* 2.

By parity of reason the rule will hold here, that as the specifick goods, by being left in the bankrupt's possession, would be subject to the commission, so must the profits be in choses in action, arising from these goods; and therefore these *mortgagees* can come in only as general creditors.

As to the last point, with regard to the assignment of *Harvest*'s whole moiety of the partnership stock in trade to *Potter*, in trust for *Stevens* the other partner, it will either fall under the consideration of an assignment to *Potter*, as a distinct person, or [173] of an assignment directly to *Stevens*: and the considering it in either of these lights will not vary the determination of the case: for considered as an assignment to *Potter*, it is difficult to say, why *Harvest*, after he had conveyed over all his share of the partnership trade, should continue still acting as the owner of it, unless it was done to acquire a delusive credit; and considered as an assignment to *Stevens*, his permitting *Harvest* to continue in possession with him, will be construed as a fraud against other persons. I apprehend that *Stevens* was *the true owner* of this moiety, and has permitted the bankrupt to continue in possession of it, as if he was the true owner, and that *Harvest* has taken upon himself the disposition of this moiety as the owner thereof, and that this comes within the words, mischief, and intent of the statute of the 21 *Jac.* 1. And if it was not to be so construed, what a door would it open to frauds?

But it is insisted, that partners in transactions with each other have the partnership stock for a security, but not more, or otherwise than in the case of strangers, for whether a partner or a stranger lends money to the partnership, they are to be first satisfied out of the partnership stock. 2 *Ch. Rep.* 117. *Com' Craven & al' con. Knight & al'* 34 *Car.* 2. 2 *Vern.* 293, and 706. and 3 *Will.* 180. which is as strong as any negative case can be; he then stated the case, and said there the executor insisted upon a right to retain as executor, but not as partner.

It may be said, that it will be laying trade under a great restraint, if a trader cannot mortgage his goods or stock without quitting trade: and to be sure cases may occur, in which there may be an inconvenience, but the inconveniencies on the other side strike me more strongly.

A man ought to quit his trade, when he has no stock to carry it on; for if it is once established, that the friends of a sinking man may secure themselves by mortgages, upon every thing that he has, without running any risque, commissions of bankruptcy will be very useless things.

I must therefore conclude, that these mortgages of goods, &c. capable of a *delivery*, will be liable to the commission by force of the statute of 21 *Jac.* 1. RYALL v. ROLLE.

Sir *Thomas Parker*, Lord Chief Baron, made four questions.

1*st*, Whether any mortgage or sale upon condition, is within the statute of the 21 *Jac.* 1?

2*dly*, Whether mortgages or sales upon condition of specifick chattels, are within the statute?

3*dly*, Whether mortgages, &c. of particular parts or shares of trade, are within the statute?

4*thly*, Whether the mortgage of *Harvest's moiety to Potter*, is within the statute?

He laid the cases of pawns and hypothecation out of the question.

Fraudulent deeds he said, might be avoided at common law.

By the 13 *Eliz. cap.* 5. they are also made void, with a proviso that this does not extend to conveyances made upon good consideration and *bonâ fide*. [174]

He cited *Twine's* case to shew, that the transaction there was not *bonâ fide*.

He then read the preamble to the clause, and the enacting clause of the 21 *Jac.* 1.

This clause, though it does not speak of fraud, was intended to prevent that false credit which is the destruction of trade, and meant to give a further benefit to the creditors of a bankrupt, than was given to them by the 13 *Eliz. cap.* 7.

It extends to conditional as well as absolute conveyances, or else a bankrupt might mortgage for almost the whole value.

The principal difficulty upon this case, arises upon the words of the statute, by the consent and permission of *the true owner*, and it is insisted that they are only applicable to absolute, and not to conditional sales, because a mortgagor, having a right to redeem, is considered as the true owner.

But the words are put in opposition to the false and pretended ownership, the bankrupt appearing to have the true ownership of the goods by *the possession*, and if a contrary construction was to take place, it would be fatal.

This was determined in *Stevens* v. *Soale*, (*a*) the 5th of *July* 1736. (*a*) Ante 17[illegible]

The second question is, Whether mortgages (or sales upon condition) of specifick chattels, are within this clause?

It is allowed to be out of the question, that the stock mortgaged underwent changes, for there is no doubt, but the produce is subject to the mortgage of the stock itself.

1st, It may be a question, Whether the bankrupt's goods only, or the goods of other persons left with him for safe custody, or sale, are within this clause?

2*dly*, Whether any, and which of the goods are within this clause?

The

RYALL v. ROLLE.

The enacting clause speaks of any goods, the preamble speaks only of the bankrupt's own goods.

It is laid down 1 *Jo.* 163. *Palmer* 485. on the construction of the statute of the 13 *Eliz.* That the preamble shall not restrain the enacting clause.

But I take it to be agreed, that if the not restraining the generality of the enacting clause will be attended with an inconvenience, the preamble shall restrain it: and this is the case here, for otherwise merchants could not correspond or carry on their business without great danger, and great difficulty.

The case of *L'Apostre* v. *Le Plaistrier*, 1 *Will.* 318. was rightly determined, I have my account of it from a short note of Sir *Edward Northey*'s (1).

So in the case of *Godfrey* v. *Furzo*, 3 *Will.* 185. where Lord *King* took this difference; when a merchant abroad, consigns to *B.* a merchant in *London* for the use of *B.* and draws on *B.* for the goods, though the money is not paid, the property vests, and they are the goods of *B.* the merchant here, and liable to [175] his debts; but where goods are consigned to a factor, as a servant, no property vests in him, nor will the goods be liable to his bankruptcy (2).

(a) Ante 158, S. C.

Ex parte Marsh, 1st of *August* 1744, (*a*) a bankrupt received 600*l.* in money, goods, and pieces of plate, the property of his wife, and, by deed before marriage, agreed that the same should be secured to trustees, for her separate use, as if she was a widow, and he gave a bond and warrant of attorney to confess judgment, and conveyed the plate to trustees in trust for the benefit of the children by the former husband, and the wife appointed it by her will accordingly.

It was ordered, that the children the petitioners should be admitted to come in under the commission for the 600*l.* and that the plate in the custody of the bankrupt should be delivered to them; for that the money, having no ear-mark, could not be followed, but the plate might.

In *Copeman* v. *Gallant* 1 *Will.* 314. I must own that Lord Chancellor *Cowper* exploded the notion of the preamble's governing the enacting clause, and went upon another reason, which was, that the assignment was with an honest intent, and to pay the debts of the assignor. I have great honour for Lord *Cowper*: but though I approve of the decree, I cannot subscribe to the reasons of it; for notwithstanding an honest intent will intitle a person to all due regard, yet an honest intent cannot take a case out of the clause of the statute.

Suppose a person acted by commission only, could there be any pretence to say, that persons who advance their money, do advance it upon the credit of *his* stock, for to him the credit is given? So where a person acts partly upon his own stock, and partly as a factor.

(1) See *Post.* 182 1 Vef. 365. 371. 586. Post. 232. S. C. *Mace* v. *Cadell.* Cowper 232.
Post. 2 vol. 205.

(2) *Ex parte Dumas*, 2 Vez. 585.

2dly,

2*dly*, Whether any, and which of the goods mentioned are within the clause; and whether any, and what possession is required to be delivered. RYALL v. ROLLE.

The goods are, utensils, hops, malt, fixtures to the freehold, and stock in trade.

As to the fixtures, they are like trees, *Hob. p.* 173. Lord Chief Justice *Hobart* says, that by the grant of the trees, by a tenant in fee simple, they are absolutely passed away from the grantor and his heirs, and vested in the grantee, and go to his executors and administrators, being, in the understanding of the law, divided, as chattels from the freehold, and the grantee hath power incident to, and implied from the grant to fell them when he will, without any other licence.

Owen 49. An action is maintainable there, for the trees were re-united to the land by the purchase of the inheritance.

To apply this, the fixtures had been several times mortgaged distinctly from the freehold, but were all revested and re-united after that, and there was no occasion to deliver them, but they would well pass by the mortgage of the freehold to the *Tomkins's*.

I admit the case in *Salk.* 368. *Poole's* case, where it is laid down that these things may be taken in execution, but I think a distinction is to be made, for here they could not be removed *by Harvest*, or taken in execution, by reason of the mortgagee's interest. And therefore I think the coppers and fixtures are liable to the *Tomkins's* mortgage. [176]

With regard to the utensils, *&c. not fixt.*

Where goods mortgaged are capable of an actual delivery, there ought to be an actual delivery; but if they cannot be delivered at the time of the contract, it will be sufficient, if the mortgagee has the documents and muniments delivered to him in order to reduce them into possession.

The delivery of a key, is the delivery of the possession, according to the civil law. *Dig.* 41. *t.* 1. *l.* 9. *p.* 5. *Vid. Domat.* And the case of *Brown* v. *Heathcote*, mentioned by Mr. Justice *Burnet*, turns upon this principle (*a*).

(*a*) Ante 170.

It is objected, that the undivided share of the stock, *&c.* in trade, will not admit of a separate property, and separate possession, and therefore that the possession of the mortgagor is the possession of the mortgagee.

It is true that partners have a joint stock, but their possession is several, and the interest is to some purposes several; as if a sheriff seizes a joint stock for a separate debt, he cannot sell the whole. 2 *Mod.* 279. 1 *Show.* 173. *Salk.* 392. *Heydon* v. *Heydon.*

I will now consider the cases cited for the defendants. 1 *Raym.* 286. *Maggot* v. *Mills.* The clause of the statute of the 21 *Jac.* 1. was not considered in this case, and one would imagine from Lord Chief Justice *Holt's* expression, that if the sale there had been made to any other person than the landlord, it would have been fraudulent?

1 *Raym.*

Ryall v. Rolle.

1 *Raym.* 724. *Cole* and *Davis*. This caſe admits of the ſame obſervation as the other, and I have ſome doubt, whether it was not compounded with a truſt. And beſides, the caſe was not within the 21 *Jac.* 1. becauſe the ſale was by the ſheriff, and not by the party, ſo that he did not take upon him the ſale and diſpoſition as *owner*.

Small v. *Oudley*, 2 *Will.* 427. In this caſe the Maſter of the Rolls diſtinguiſhed betwixt a man's own trade and the trade of another perſon, and the reaſon of that was, becauſe the bankrupt was not in poſſeſſion, and could not deliver the goods, and unleſs they could paſs by aſſignment, they could not paſs at all.

Bucknal v. *Royſton*, *Pr. Ch.* 285. Was a bill of ſale of the produce of a cargo going to ſea, and it depended ſolely on the law of merchants, for there was no bankruptcy in that caſe, and Lord *Cowper* ſays, that in the caſe of a bankrupt, ſuch keeping poſſeſſion after a ſale, will make the ſale void againſt creditors, ſo that this is an authority rather againſt the defendants, than for them.

In the preſent caſe, the poſſeſſion of the goods was not delivered, though capable of delivery, and the bankrupt had the evidence of the partnerſhip in his hands, and acted as *owner*, and the mortgage was a ſecret to every body but the parties; ſo [177] that all the circumſtances mentioned in the act concur to bring this caſe within it, and conſequently I think theſe are things liable to the bankruptcy.

The third queſtion is, Whether ſales or mortgages, on condition, of particular parts or ſhares of trade, and the produce of trade are within this clauſe.

I ſhall confine myſelf here to *things in action*, as ſuch mortgages are like ſo much of the balance mortgaged.

It is objected that this clauſe does not extend to things in action, becauſe it ſpeaks only of things in the poſſeſſion of the bankrupt at the time of the mortgage.

But chattels comprehend things in action. *Slade*'s caſe, 4 *Co.* 95. *a*. Things in action are goods and chattels in a perſon attainted. *Lit. Rep.* 86. 12 *Co.* 1.

If goods and chattels will comprehend *things in action*, in the conſtruction of any act of parliament, they ought much more to do ſo in this, for otherwiſe a trader might cheat his creditors by aſſigning over ſuch things; and this is enforced by the firſt clauſe of the act, where it is provided, that every thing ſhall be conſtrued moſt beneficially for the creditors.

It is further objected, that things in action are not aſſignable but in equity, and do not admit of a delivery.

If a bond is aſſigned, the bond muſt be delivered, and notice muſt be given to the debtor; but in aſſignments of book debts, notice alone is ſufficient, becauſe there can be no delivery; and ſuch acts are equal to a delivery of goods which are capable of delivery.

Domat.

Domat. l. 1. *t.* 2. *s.* 2. *par.* 9. says, Things incorporeal, such as debts, cannot properly be delivered. This is to shew the nature of assignments of debts by notice to the debtor. RYALL v. ROLLE.

This clause therefore extends to *things in action*, and all has not been done that might have been done by the assignee to vest the right of them in himself, and to take away from the bankrupt the power and disposition of them, for no notice has been given to the debtors.

The fourth question is, Whether the mortgage of *William Harvest's* moiety of the partnership stock and trade be within this clause? And this is the most difficult question.

It is objected that though *Potter* did not take possession, yet he was merely a nominee for *Stevens*, and that *Stevens* being partner before, was in possession as partner *per mie et per tout*.

But the question still remains, Whether, when *Stevens* became intitled to the whole stock, he should not have taken the sole possession exclusive of *Harvest*, in order to take the mortgage out of the statute? And I think he ought to have taken possession of the whole.

For according to the fact in this case, *Harvest* at the time of his bankruptcy continued, and appeared to be, in possession of one moiety of the partnership stock, &c. by the consent of *Stevens*.

But it is said that the law will construe *Stevens* to be in possession according to his right.

There is no reason for such a construction, as *Stevens* suffered *Harvest* to continue to act inconsistently with his right. [178]

Another difficulty is, that the partnership stock is in the first place liable to the partnership account, according to the authority of the case of *Pyke* v. *Crofts*, 3 *Wms.* 180, and that this is no more than applying the partnership fund, which was to pay the partnership creditors, to the use of a partner who has made them a satisfaction another way; as where one of the partners is charged with more than he ought to be, equity gives him a lien on the partnership stock to reimburse himself.

But this is not applicable to the present case, because *Harvest* did not borrow any of the partnership money, or imbezil any of the partnership effects; nor was the transaction a partnership transaction, or the money lent upon the partnership account. And this principle of equity has never been extended to private loans, but it has always been confined to partnership transactions, and I think it proper it should be so confined.

Lord Chief Justice Lee: I agree with Mr. Justice *Burnet*, that these securities are to be considered as mortgages, and I shall consider them in that light.

At common law it was left to the jury to consider, whether conveyances of this sort were fraudulent against creditors or not.

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This case must be determined upon the statute of 21 *Jac.* 1. The 13th of *Eliz.* is only declaratory of the common law, and as all the cases upon that statute have been fully answered by the Chief Baron and Mr. Justice *Burnet*, I shall say nothing more upon these cases, or upon that statute, but shall confine myself to the 21st of *Jac.* 1. because I think that there the line is drawn, and the *certi fines* are to be found there.

The question will be,

1st, Whether the mortgagee is not the true owner to whom there should have been a delivery?

2dly, Whether the debts and choses in action should not have been delivered as far as they were capable of delivery?

3dly, Whether *Stevens* has had such a possession, as will exempt him from being considered as an owner, by whose consent the bankrupt has had goods and chattels in his possession, and taken upon him the disposition thereof?

By goods and chattels I mean such as were fixed to the freehold, and might be severed when the mortgage was satisfied.

The general preamble to this statute says, that several defects had been found in the former statute, and that one of them was in the power given to the commissioners for the discovery and distributing of the bankrupt's estate. The particular preamble to this clause recites, "That persons before they become bankrupts do convey their goods to other men upon good consideration, yet still do keep the same, and are reputed *the owners* thereof and dispose the same as their own."

The clause now in question is the provision against this mischief, and every word is to be considered; this case is within [179] the preamble, for the bankrupt has conveyed the goods to the mortgagee; and as this falls within the words of the preamble, there is no occasion to give any opinion whether the preamble is to restrain the enacting clause or not. By the 13 *Eliz. cap.* 5. there was an express proviso, that it was not to extend to conveyances *bonâ fide*; and this was the difficulty for the commissioners to discover.

I apprehend that the direction there given, that if any person shall become a bankrupt, and have in his possession goods, &c. *was* to remedy the inconvenience that arose in injuries upon the former statute, whether the sale was *bonâ fide* or not, by making the reputed ownership of the bankrupt, the real ownership in him for the benefit of his creditors, because if *the true owner* suffers the bankrupt to become the reputed owner, he deprives himself of the benefit of his conveyance, and the bankrupt having gained a credit by his means, and hurt his other creditors, he shall be in no better condition than they are.

Is the mortgagee then the true owner?

The 21 *Jac.* 1. *s.* 13. describes the mortgage in these words: "If any person that becomes a bankrupt shall convey or assure, "&c. any lands, tenements, hereditaments, goods, chattels or "other estate, unto any person upon condition or power of re-"demption at a day to come, by payment of money or other-"wise."

This

This is the description that the statute has made of a mortgage, not only of land, but of goods upon condition. *Co. Lit.* 210. *a.* If a man makes a feoffment in fee, upon condition that the feoffee shall pay the feoffor, his heirs or assigns, 20*l.* at such a day, and before the day the feoffor makes his executors and dies, the feoffee may pay the same either to the heir or the executors, for the executors are his assignees in law to this intent. RYALL v. ROLLE.

But if a man make a feoffment in fee, upon condition that if the feoffor pay to the feoffee, his heirs or assigns, 20*l.* before such a feast, and before the feast the feoffee maketh his executors and dieth, the feoffor ought to pay the money to the heir and not to the executors; for the executors in this case are no assignees in law, and the reason of this difference is given in the book, that the feoffor hath but a bare condition, and no estate in the land which he can assign over; but in the other case the feoffee hath an estate in the land that he may assign over, which is in other words saying, that the mortgagee is the owner, and has the interest in him; and 2 *Cro.* 244. cited by Mr. Justice *Burnet*, as to the difference between a pawn and a mortgage, goes to the same matter.

The difference taken betwixt conditional and absolute sales, and the cases thereon, have been observed upon already. I shall only mention one of them. *Stone* and *Grasbon*, 2 *Bulst.* 206. That case was a condition upon a future consideration. The words of Lord *Coke* which are relied upon are, that the possession of the mortgagor was not fraudulent, but if it had been an absolute conveyance, it would have been fraudulent.

I look upon this case to have been determined intirely upon the statute of 13 *Eliz.* *c.* 5. and the common law, the plan of which statute differs from that of the 21 *Jac.* 1. It is against fraudulent conveyances, with a proviso in favour of conveyances *bonâ fide*, whereas the act of the 21 *Jac.* 1. supposes a fair conveyance, but deprives the party of any preference, because he does not give proper notice of his conveyance, and it seems to me that the cases upon this statute are more like the cases that may happen upon the registring acts, where a person does not register, and so loses the priority of the security: so here the donee is not to suffer the donor to continue in such a possession, as is prescribed against by the act. And though the case cited is not material to the point in question, yet I think nothing of what was said in that case establishes a difference betwixt a conditional and absolute sale; yet it is material, that a mortgagor, who continues in possession, is before the condition broken tenant at will to the mortgagee, which shews that the mortgagee must be considered as the true owner of the land. [180]

As to the other cases cited to establish this difference betwixt conditional and absolute sales, I shall not go over them again, because they have been fully answered.

Stevens v. *Sole*, (*a*) 5th of *July* 1736, is a case in point on a mortgage of a personal thing, and Lord *Cowper*'s saying in the other case is an authority upon this question, though upon another point; for he says in *Bucknall* and *Royston*, *Pr. Ch.* 287. That (*a*) *Ante* 157.

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That "such a keeping possession after a sale as is described by "the 21 *Jac.* 1. which is a possession with the liberty of the "disposing the goods as his own, would make the bankrupt's "sale void against his creditors by the statute: this case there- "fore must be considered as an authority to the same purpose "with that determined by Lord *Talbot*, and both determine the "question with regard to specifick goods."

I am of opinion, it will be the same as to the shares of the partnership stock, partly in possession, and partly in action, and as to all choses in action, as debts capable of being assigned in a court of equity. Some books indeed, as *Swinb. p.* 498. edition the 6th, seem to countenance an opinion that goods do not include bonds, *&c.* For notwithstanding he says, that by *goods* the civil law understands not only things in possession, but also things for which a lawful action may be had; yet in the same page he lays it down, that, by the laws of this realm, the word goods is otherwise understood, and never includes things which are of the nature of freehold, nor things in action, as a debt upon a promise, or obligation (1). So *Coyle*'s case, 8 *Co.* 32. carries some appearance of the like opinion, where it is said, that an innkeeper is answerable for the loss of a bond, being obliged to keep the goods and *chattels* of his guest, for though it is there said that goods and chattels do not properly comprehend charters and evidences concerning a freehold, or inheri-
[181] tance, or obligations, or other deeds or specialties being things in action, and yet, in this case, the writ against an hostler or innkeeper is expounded to extend to them: I apprehend that these opinions were grounded upon the notion, that choses in action did not pass even by statute, any more than they were grantable by a bargain and sale, *&c.* but there are so many authorities to contradict them, that I take that point to be settled.

A corporation cannot take a recognizance or obligation in their publick capacity, because they cannot take a chattel. *Catalla* comprehends a right of action, and is the only word in the statute to give this right. 12 *Co. p.* 1. *b. Ford* and *Sheldon*'s case. This point was in question, whether choses in action come under the word goods, and it is there said, that personal actions are as well included within this word *goods*, in an act of parliament, as goods in possession.

If *goods and chattels*, in the statute, include choses in action, all things arising from the sale of the joint stock are subject to the assignees, as they follow the nature of the goods themselves, and Mr. Justice *Burnet* has cited cases to shew that they are so, where the thing can be discovered.

Swynb. 506. 6th edition, is upon the same foundation: If a man devises his moveable goods to *B.* and his immoveable to *C.* upon a question how the debts shall go? He says, those debts which did arise by occasion of the things moveable, and for the recovery whereof there lies an action personal, belong to that person to whom the testator did bequeath his moveable goods;

(1) See *Chapman* v. *Hart*, 1 *Vef.* 273. *Moore* v. *Moore*, 1 *Bro. Cha. Rep.* 127.

which shews that the produce of the goods were of the same nature with the goods themselves. Ryall v. Rolle.

As to *Stevens*'s mortgage, it being made to *Potter* in trust for *Stevens*, it is to be considered as a mortgage to *Stevens*; and as to the objection that *Stevens*, being in possession, wanted no new possession to be delivered, the answer has been given, *That Harvest* had the possession with the consent of *the true owner*, which he ought not to have had.

Croft v. *Pyke*, 3 *Will.* 180. is the case that was called a negative one.

Though this has been no where determined; yet one may use a citation from a Civil law book, not as an authority upon which a judgment is to be founded, as it has not been received here, but as the opinion of learned men, and for this saying he cited *Blackborough* and *Davis* from a manuscript note, where Lord Chief Justice *Holt* advances the same thing. I shall therefore mention *Domat. lib.* 1. *fo.* 155. where he says, debts owing by the partnership, and their other charges, are to be borne out of the common stock, otherwise as to the money borrowed by a partner which has not been applied to the common stock.

I mention this to prove that the partnership stock is no further subject to debts from one partner to another, than as the money has been applied to the partnership trade.

Upon the whole, the statute is the rule to be followed in this case; the intent of it was to prevent bankrupts from acquiring a false credit, and to punish accessories by the loss of the priority of their debts. Whether this was a wise provision or not, is not for us now to determine, it must be followed as long as the act continues in force. [182]

Lord *Hardwicke* Chancellor: this is a question of great consequence, I will endeavour to reduce the grounds I go upon to some general heads.

1*st*, Whether any mortgage or conditional disposition or conveyance of any goods and chattels is within the 21 *Jac.* 1. *c.* 19. *s.* 10, 11.

2*dly*, If any is, whether the present mortgages, and which of them are so?

3*dly*, Whether the mortgagee of the moiety of the partnership's stock, *&c.* is within the act?

1*st*, Whether any mortgages, or conditional conveyances of goods are within the act?

Under this general question, I shall not enter into a particular disquisition of the two points made at the bar.

1*st*, If the enacting clause extends to all goods in the custody of the bankrupt, whether his own originally or not, or whether it is to be restrained by the preamble, to goods only, that were originally the bankrupt's.

Or, 2*dly*, Whether choses in action are within the clause?

RYAL v. ROLLE.

For as to the first, the Chief Baron has entered so far into the construction of it, as not to leave any room for doubt: however, let the construction be what it will, the present case, as to this point, is within the act, because it is not disputed but that all the goods here in question were originally the bankrupt's, and were mortgaged by him.

But still in this respect I shall not scruple to declare that I am strongly inclined to be of opinion with Lord Chief Justice *Holt*, and my Lord Chief Baron, that this clause is to be restrained by the preamble, and differ from Lord *Cowper* in the case of *Copeman* v. *Gallant*, 1 *Will.* 314. (1).

As to the other point, it has been fully cleared up, that *choses in action* are properly within the description of goods and chattels in this clause.

But I will add one argument: It is that the construction which has been put upon this clause is supported by the next immediate precedent clause in the act, it relates to bankrupts, who by fraud make themselves accomptants to the king to defeat their creditors, where there is a power given to the commissioners, to dispose of all lands, tenements, hereditaments, goods, chattels, and debts of the bankrupt so extended, to and for the use of the creditors, and yet, when it comes to the provision, it rests intirely upon the words *lands, tenements, goods and chattels*, and was designed to comprehend all kind of *personal property*, whether in possession *or action only*.

[183] In 12 *Co. Ford* and *Sheldon*'s case, it is laid down, that in an act of parliament the words *goods and chattels* take in choses in action, and the contrary opinion seems to have arisen upon questions on grants, and bargains and sales, by which they could not pass; but an act of parliament, which may pass any thing, will take in the whole.

The aim of the legislature in all statutes concerning bankrupts was, that the creditors should have an equal proportion of the bankrupt's effects as far as possible.

And it was intended that this act should be construed beneficially for the general creditors, and it is so declared in an unusual manner in the first clause of the act.

The general view of the provision now in question, to prevent traders from gaining a delusive credit, from a false appearance of their circumstances.

The general view of the provision now under consideration, was to prevent traders from gaining a delusive credit from a false appearance of their circumstances, to the misleading and deceit of those who should trade with them, and the legislature thought they had done this by subjecting all things remaining in the possession of the bankrupt, to the creditors under the commission, because where the vendee leaves the goods bought in the possession of the bankrupt, he confides as much in the general credit of the bankrupt, as that creditor who has taken only a bond or note.

(1) So ante 174, 175. 1 *Vef.* 365, 371. Lord *Hardwicke* seems also to have been of the same opinion, in *West* v. *Skip*, 1 *Vef.* 243. See *Crespigny* v. *Wittenoom*, 4 *Durn. and East*, 793.

In

In ſuch caſes, the bankrupt had it in his power to ſell all the goods the next hour, and the vendee or aſſignee could not claim them from the buyer, but could only have a perſonal remedy againſt the bankrupt.

RYALL v. ROLLE.

All this holds as well in the caſe of conditional, as of abſolute ſales, and if the court ſhould make a different determination, it would be contrary to the caſe of *Stephens* v. *Sole*, determined by Lord *Talbot*, and to *Buckland* v. *Royſton*, by Lord *Cowper*, and to the implied opinion of the laſt in *Copeman* v. *Gallant*.

The ſtatute of the 21 *Jac.* 1. *c.* 19. extends to conditional as well as abſolute ſales.

I chuſe to forbear obſerving upon the words of the clauſe, becauſe that has been done already.

The legiſlature has explained it's ſenſe by putting the words *true owner*, in oppoſition to *the reputed owner*.

The 2d queſtion is, Whether any, and which, of the mortgages are within the ſtatute?

According to the authority of the caſes which have been mentioned the mortgages of the 10th *Dec.* 1737, and of the 6th and 7th of *Sept.* 1738, and ſo much of the aſſignment to *Stevens*, as relates to the utenſils not fixt to the freehold, and alſo the mortgage of the 6th of *March* 1738, are within the ſtatute, and made void by it.

A ſhare of the partnerſhip trade, &c. mortgaged to a partner, muſt be delivered, or it is a deluſive credit and falls within the ſtatute of the 21 *Jac.* 1. *c.* 19.

If it was to be laid down, that a ſhare of the partnerſhip trade, &c. mortgaged to a partner, is not neceſſary to be delivered it would let in all the inconveniencies which were to be prevented by this ſtatute.

*As to choſes in action, equity ought to follow the law; if it does not, infinite miſchief would follow. It is eaſy to turn a legal into an equitable intereſt, and if parliamentary proviſions as to a legal intereſt were not to be followed as to equitable intereſts, it would defeat the act. Thus upon the Popiſh acts, tho' penal, the conſiderations and rules are the ſame in equity as at law.

The proviſions in the 21 *Jac.* 1. *c.* 19. *ſec.* 11. with reſpect to legal intereſts, muſt be followed as to equitable ones; *choſes in action* therefore within the meaning of the act, and are included in the words *goods and chattels*.

It was ſaid, that the mortgages to *Potter* for the benefit of *Stevens*, muſt be conſidered as a mortgage to *Stevens*, and it may be generally right to conſider it ſo; though yet, as a judge in equity, I am inclined to carry it farther than the judges at common law have done; for whatever intereſt paſſed of the perſonal things, paſſed in law to *Potter*; and if the caſe had been at common law, a court of law would not have taken any notice of the truſt for *Stevens*, and then by the ſtatute this aſſignment had been void at law againſt *the commiſſioners*, and a court of equity would never ſet it up here.

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And therefore I make a difference betwixt ſuch things as, being aſſignable only in equity, gave no title to *Potter* at law; for as to theſe the mortgage is to be conſidered as being made directly to *Stevens*, but as to thoſe things, in which an intereſt paſſed at common law to *Potter*, I think *Potter* is to be conſidered as having the legal property.

Ryall v. Rolle.

How far partnership stock is liable to the debts of partners in the first place.

As to the question, whether partnership stock is to be first liable to the debts of the partners, it was never carried further than to debts contracted relative to the partnership, either after the bankruptcy, or death of one of the parties.

Where one partner lends money to another partner generally, and it is not entered in the partnership books, he does not gain a specific lien upon the share of the borrower.

Where a partner lends money to another generally, and it is not entered in the partnership books, it is said he gains a specific lien upon the share of the borrower, and shall be preferred to separate creditors; but I find no foundation for this, after a bankruptcy, nor after the death of a partner, where his effects have become subject to the rule of distributing assets. What equity there may be between partners themselves, on settling an account, is another thing.

Crofts verf. *Pyke*, 3 *Wms.* 150, is as strong a negative case to this purpose as can all that was contended for there, being that he might retain as executor.

If it should be determined that one partner should gain a specifick lien, by lending money to the other upon the partnership stock, it would open a door to great fraud, and give a shock to this act, which is made on purpose to prevent a false and delusive credit.

I will take notice of one thing mentioned by Mr. Justice *Burnet*, and the Chief Justice.

It has been said in this cause, that great mischief might arise to trade and credit from making securities of this kind void, because it might prevent persons from using their credit in trade, and that they will not be able to make a security, without exposing their circumstances to the world, which may hurt their credit.

On the other side it has been argued, that a delusive credit is still of more dangerous consequence.

[185] I will not say but some inconveniencies may arise on each part; but I agree with the Chief Justice, that, as it is a law, it must be adhered to, and we cannot depart from it. If any inconvenience does arise, it is for the consideration of the legislature whether it ought to be allowed or not

But this I will say, that very great inconveniences may arise by giving an opportunity to people to make such securities, and yet appear to the world as if they had the ownership of all those goods of which they are in possession, when perhaps they have not one shilling of the property in them.

And further I will venture to say, that it was the design of the act of parliament to prevent this; for the act was made in the simplicity of former times, long before those large and airy notions of credit prevailed, which have been since introduced.

This act is a law, and I concur with my Lords the Judges in the opinion that they have given, and the construction that they have put upon it; and do therefore determine that these mortgages and securities are not a lien upon the bankrupt's estate (1),

(1) *Edwards* v. *Harben*, 2 *Durn.* & *East*, 587. *Bamford* v. *Baron*, *ibid.* 594. See also *Falkner* v. *Case*, 1 *Bro. Cha. Rep.* 125, 2 *Durn.* & *East*, *Rep.* 491.

THE cause coming on again for directions, and a question arising, whether a debt could be set off within the provision of the statutes of bankrupts?

February the 4th, 1749.

1 Vef. 375. S. C. S. P.

A person may set off a debt under the bankrupt acts, though not relative to the mutual credit between him and the bankrupt.

Lord Chancellor said, that under the act of the 5th of *George* the Second, persons might set off debts, as that act extended to all mutual debts, though independent of, and not relative to the mutual credit between the bankrupt and other persons in the course of trade, and though the debts were of such a nature as could not be brought into a general account (1).

(1) *Billon* v. *Hyde*, *ante* 126.

On the Petition of *Richard Flyn* and *Richard Field*, Merchants, in the Bankruptcy of *Hugh Mathews*.

December the 23., 1748.

Case 98.

THE petitioners being at *Liverpool* the beginning of *July* last, and purposing to be concerned together in purchasing plantation tar, they found on enquiry a quantity thereof to the *amount of 500 barrels lying on the quay of *Liverpool*, which *Hugh Mathews*, a merchant of that town, had then imported for sale; whereupon the petitioners and *Mathews* came to an agreement together on the 8th of *July*, whereby *Mathews* sold to the petitioners two-thirds of 500 barrels of the said tar at the rate of 9*s*. *per* barrel, and the other third he agreed should go and be consigned to the petitioners for sale at his risque, on his own account, and that he should be at the charge of cartage and porterage, and shipping off the said 500 barrels of tar, and that the petitioners should sell his share of tar free from charges of commission.

One *Mathews* sold to the petitioners two thirds of 500 barrels of tar, at the rate of 9*s*. *per* barrel, and the other third he agreed should be consigned to petitioners for sale at his risque, and on his own account, and that he should be at the charge of cartage and porterage, and shipping off the whole, and *Mathews* accordingly caused the tar to be put into a warehouse of his own, for the purposes of the agreement: Petitioners at the same time paid *Mathews* in *London* bills 150*l*. the amount of two-thirds, and *Mathews* made them out a bill of parcels. *Mathews* afterwards becomes a bankrupt, and the assignees take possession of the tar, as they found it remaining in his warehouse. This is not within the intent of the 21 of *Jac.* 1. *ch.* 19. which meant to guard against leaving goods, in the *possession, order, and disposition of bankrupts*; but here was only a mere temporary custody, till the petitioners had an opportunity of shipping it off to *Ireland*. The petitioners intitled to two-thirds of the tar, and the assignees ordered to deliver the same accordingly.

And it was further agreed that the said tar should be removed from the quay, and lodged in a warehouse until the petitioners should give orders for the shipping the same off as opportunity offered, they having none at that time; *and accordingly* Mathews *caused the said tar to be put into a warehouse or cellar of his own, for the purposes of the said agreement.* [*186]

The petitioners at the same time paid *Mathews* in *London* bills for 150*l*. being the amount of the value of the said two-thirds of the said tar agreed for, *Mathews* also at the same time made out and delivered the petitioners a bill of parcels of the said tar, in the words and figures following: *Liverpool*, 8*th* July 1748, *Messrs.* Richard Flynn *and* Richard Field, *bought of* Hugh Mathews *two-thirds of* 500 *barrels of plantation tar, at* 9*s.* per *barrel, the whole amount* 225 l. *the whole to be sold by said gentlemen for*

FLYN v. MATHEWS. *for account as follows, two-thirds their account* 150 l. *one-third* Hugh Mathews's *account* 75 l. Hugh Mathews *to bear charges of cartage and porterage in sending off, then received bills on* London *amount* 150 l. *when paid is in full of their part,*

per Hugh Mathews.

Mathews the beginning of *August* last became a bankrupt, and the assignees under the commission issued against him, have taken possession of the said tar as they found it remaining in his warehouse, and being doubtful whether they can deliver the same, with safety to themselves, to the petitioners, the assignees and *Flyn* and *Field* have agreed to be determined by *Lord Chancellor* on petition, which came on now before his Lordship for directions.

The question arose on the following clauses of the 21 of *Jac.* 1. *ch.* 19.

" *For that it often falls out that many persons, before they become* " *bankrupts, do convey their goods to other men upon good considera-* " *tion, yet still do keep the same, and are reputed the owners there-* " *of, and dispose of the same as their own;*

" Be it enacted, that if at any time hereafter any person or " persons shall become bankrupt, and at such time as they shall " so become bankrupt *shall by the consent and permission of the true* " *owner and proprietary have in their possession, order and disposition,* " any goods or chattels, *whereof they shall be reputed owners,* and " take upon them the sale, alteration, or disposition as owners, " the commissioners shall have power *to sell and dispose the same*
[187] " for the benefit of the creditors, which shall seek relief by the " said commission, as fully as any other part of the estate of " the bankrupt."

Mr. *Wildbraham* for the *assignees.*

There are two sorts of persons affected by this clause.

1. Persons who are purchasers of goods, though for a good consideration, or *true owners* of goods, and who yet leave them in the hands of the bankrupt.

2*dly*, The creditors of bankrupts.

The intent of this law was to prevent persons intrusting traders with the possession of goods where they have not the property; possession gives a species of property, and a possessory property is a good property against wrong-doers. The possession always creates a presumption of absolute property, it makes a man the visible owner, this specious ownership creates a credit, and draws in innocent persons to give credit upon the faith of appearances; if they are false appearances, they are drawn in to give credit to that which has no reality, but is merely fictitious.

This act of parliament intends to remedy that inconvenience by preventing this practice, and in order thereto imposes a penalty upon such practice, whether it arises from design or inadvertency.

Lord Chancellor: I think this case is not within the intent of the act of parliament, which meant to guard against leaving goods in the *possession, order, and disposition of bankrupts*; but here it

it was merely a temporary custody, because the petitioners, the buyers of the tar, had not an opportunity of selling it by shipping it off immediately to *Ireland*. FLYN *v.* MATHEWS.

It cannot with any propriety be said the tar was in *the order, disposition, or power of the bankrupt*, and therefore not within the act of parliament.

Upon the foot of the agreement between the petitioners and *Mathews*, this is to be considered as an undivided property, of which they were tenants in common; there must be a possession of those goods in one or other of them, and the possession of one is the possession of all, and therefore the petitioners are intitled to two-thirds of the tar, and the assignees must deliver up the same to the petitioners (1).

(1) So *West* v. *Skip*, 1 *Ves.* 239. 243. 456. *Walker* v. *Burnel*, *Doug.* 303.

(X) *Rule as to Copyholds under a Commission of Bankrupts.*

Drury v. *Man*, surviving Assignee of *Johnson*, a Bankrupt. *July* the 3d, 1746.

Vide under the Division, Rule as to Assignees.

(Y) *Where Assignees are liable to the same Equity with the Bankrupt.* [188]

Brown v *Jones* and others. *October* the 25th, 1744.

Case 99. Though the court will favour creditors, yet it must be, where they have a superior right to other persons.

THE bill in this case was brought by the assignee under a commission of bankruptcy against *Roger Williams*, to have a real estate belonging to the bankrupt sold.

The questions in this cause arose upon a settlement made by the bankrupt of this estate upon his wife and children after marriage.

The Attorney General for the plaintiff stated the settlement to be made on the 8th of *August* 1732, between *Roger Williams* and his wife, and *Richard Blencoe*, and the defendant *Brown*, and another person as trustees, recited to be in consideration of a marriage already had, and the sum of 1000*l.* paid as a marriage portion to *Williams* by *Blencoe*, who was brother to his wife and for settling a jointure, and conveyed to the trustees to the several uses following: To *Roger Williams* for life, and from and after the determination of that estate to the trustees to preserve contingent uses during *Roger Williams*'s life, and from and after his decease, to *Elizabeth* the wife for her jointure, and after the decease of husband and wife to the use of the trustees for and during 99 years, on such trusts as herein and hereafter expressed, and after the determination of that estate, to the first and other sons in tail male.

There was no declaration of the uses of the term of 99 years, nor any receipt indorsed on the back of the settlement; and as there

there was no declaration of the truſt of the 99 years term, he inſiſted the reſulting uſe or truſt will revert to the huſband who gave it, and therefore will enure for the benefit of the creditors of the huſband.

Mr. *Brown* of the ſame ſide.

The circumſtances of fraud in this caſe are very ſtrong, the ſettlement was not made till ten years after marriage; *Roger Williams* the huſband never thought of this deed or mentioned it on his laſt examination, which is very ſuſpicious, and looks like a plank laid hold of to ſave them from ſhipwreck.

Mr. Solicitor General for the defendants, the wife and children.

Roger Williams was no trader in 1732, and the act of bankruptcy was not till ſix years afterwards.

If it was a mere voluntary ſettlement, perhaps it could not be ſupported againſt the creditors; but there are many agreements, after marriage, which may be ſupported as fair, and for valuable conſideration. *Scott* v. *Ball*, 2 *Lev.* 70. A queſtion between purchaſers and the iſſue of the marriage, whether an agreement after marriage was for a good and valuable conſideration? Lord [189] Chief Juſtice *Hale* ſaid, the court in family agreements do not nicely eſtimate the value of the eſtates, but only whether it is a fair and honeſt agreement.

The facts in the preſent caſe are ſhortly theſe: *Roger Williams* was ſeiſed of this eſtate in 1722, had only 150 *l.* with his wife at that time, and no ſettlement then made; Mr. *Blencoe* her brother applied to *Roger Williams* to make a proviſion for his ſiſter; *Roger Williams* ſaid he would not do it for nothing, on which *Blencoe* agreed to advance 1000 *l.* the 24th of *June* 1732, a receipt was given under the hand of *Roger Williams* to *Pottinghal* an attorney in the following words: *Received of my brother* Richard Blencoe, *the ſum of* 600 *l.* *by the hands of Mr.* Pottinghal, *in conſideration of the ſettlement to be made upon my wife.* The ſettlement was executed in *Auguſt* after: *Richard Blencoe* died the *October* following, and therefore the remaining 400 *l.* was never paid.

There being no receipt indorſed, is ſo far from being a circumſtance of fraud, that it ſhews the fairneſs, becauſe, as the whole 1000 *l.* was not paid, they could not properly indorſe it.

In anſwer to the objection of the 99 years term having no declaration of truſt, it muſt be conſidered as if the huſband was contending. All the uſes ſhew it to be a marriage agreement; the limitation indeed is to truſtees generally, but is declared to be for ſuch a truſt as is thereinafter expreſſed.

The term is to ſtand no further than it ſhall be thereafter declared, and the very nature of the agreement ſhews, that it cannot reſult for the benefit of the huſband, and it is demonſtration to a court of equity, that it could never be intended that the uſes of this term ſhould be for his benefit, becauſe it would make the limitation to the ſons of no value: there is no doubt then but the parties meant it as a proviſion for younger children,

and the want of the formal deed, a leaſe for a year, no material.

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Mr. Attorney General's reply; the fact proved is, that this ſum of 600*l.* was in conſideration of a ſettlement to be made. It is pretty extraordinary that this ſum ſhould be paid three months before the ſettlement executed.

To make this a conſideration, it is incumbent upon them to ſhew it was the money of the brother, but it is expreſſed to be in conſideration of 1000*l.* in hand paid for the marriage portion, but not ſaid to be paid by the brother Mr. *Blencoe*; neither has he ſigned the deed; now if he was a party contracting on his own account, could it be thought he would not have ſigned the deed?

It does not appear that this was a portion which could not be received without coming into a court of equity; therefore it is hard to ſay, that this is ſuch a conſideration, that the creditors of the huſband ſhall not have a ſale of the eſtate without eſtabliſhing the proviſion for the wife: this is not a ſettlement to be carried into execution, therefore the court muſt take it on the very terms on which it ſtands.

Lord Chancellor: This caſe is made out to my ſatisfaction. [190] Tho' the court will favour creditors as much as they can, it muſt be where they have a ſuperior right to other perſons.

The queſtions in the cauſe are,

1ſt, Whether the deed is to be conſidered as a valid ſettlement?

2dly, If it be, Whether the creditors can claim any benefit under the ſettlement?

Now as to the firſt: It depends upon *the conſideration*, for it muſt be agreed; if the bankrupt has made a ſettlement without *conſideration*, it is not good. This is a queſtion of fact, and is ſufficiently proved to ſatisfy me.

A ſettlement after marriage good, if it be upon payment of money as a portion, or a new additional ſum, or even *an agreement* to pay money, if afterwards paid.

It is admitted, if a ſettlement is made before marriage, though without a portion, it would be good, for marriage itſelf is a conſideration (1), and it is equally good if made after marriage, provided it be upon payment of money as a portion, or a new additional ſum of money, or even an agreement to pay money, if the money be afterwards paid purſuant to the agreement; this is allowed both in law and equity, to be ſufficient to make it a good and valuable ſettlement (2).

The receipt *Roger Williams* gave for the 600*l.* makes it very clear it was the money of *Blencoe* the wife's brother, for the words are *in conſideration of my making her a jointure, or marriage ſettlement.*

It has been objected, that this is a recital only, under the hand of a bankrupt, and therefore ſuſpicious; but to take off the ſuſpicion, the ſon of *Pottinghal* ſwears, he ſaw this receipt

(1) See *Ex parte Marſh, ante* 158. *Lacoy* v. *Athol, poſt.* 2 *vol.* 445.

(2) Such ſettlement good not only againſt *creditors*, but againſt *purchaſers*. *Colville* v. *Parker, Cro. Jac.* 158. *Jones* v. *Marſh, Ca. temp. Talb.* 63. *Ward* v. *Shallet*, 2 *Veſ.* 16. *Hylton* v. *Biſcoe*, 2 *Veſ.* 308. *Wheeler* v. *Caryl, Amb.* 121. *Lacoy* v. *Athol, poſt.* 2 *vol.* 444. 446.

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[…]n his father's hands in 1732, six years before *Roger Williams's* [b]ankruptcy.

Another objection is, that the 600*l.* being paid before the settlement made, therefore it cannot be deemed as the consideration of the settlement.

A consideration executed, is as good to support a settlement, as it is at law to support an *assumpsit*, to pay money at a future time.

It is further objected, that it does not appear on the face of the receipt, that it was the brother's money, but might be the wife's, and consequently a chose in action of the wife's, which the husband might have recovered in possession.

Supposing it had been so, if it had been in the hands of the brother, and the sister had been married indiscreetly, and the brother holds his hand till the husband makes a provision, it was honestly done, and is no more than what the court would have done, and will equally support it, as if a bill had been brought against the husband to make a provision for his wife (1).

The creditors stand only in the place of the husband, and the statute of the 1 *Jac.* 1. *cap.* 15. was made to put creditors under a commission of bankruptcy in the same condition with creditors under the statutes of the 13 and 27 *Eliz.*

It has also been objected, that this is a defective settlement at law for want of the lease for a year (2).

Where creditor can have no remedy at law, but must come into equity, this court will make them do equity.

* But notwithstanding the court will aid creditors against defective or fraudulent conveyances, and without consideration, and voluntary settlements, yet if they have no remedy at law, but must come into equity, this court will make them do equity, which brings it to the case of *Taylor* v. *Wheeler*, 2 *Vern.* 564 *.

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Though in a conveyance by lease and release, the lease is missing, yet if a consideration be proved, the release will amount to a covenant to stand seized.

The same equity will arise in the case of a conveyance by lease and release, the lease being lost, does not at all concern the substance of the case, and a consideration being proved (3), though the lease is missing, yet the release will amount to a

* *A.* mortgages copyhold land to *B.* but the surrender not being presented within the time limited by the custom, became void. Afterwards *A.* becomes bankrupt. On a bill by *B.* against the assignees, this defective surrender was made good.

(1) So *Moor* v. *Rycault*, Prec. Cha. 22. *Middlecome* v. *Marlow*, post. 2 vol. 519. *Wheeler* v. *Caryl*, Amb. 121. *Ward* v. *Shallet*, 2 Ves. 17. *Like* v. *Berrisford*, 3 Bro. Cha. Rep. 366.

(2) *Vide Negus* v. *Reynal*, 1 *Keb.* 12. *Ford* v. *Grey*, *Mod. Ca.* 44. 1 *Salk.* 285. S. C.

(3) i. e. a consideration of *Marriage* or *Blood*; for a *pecuniary* consideration will not raise an *use* by way of covenant to stand seised. For the reasons of this distinction, the reader is referred to the editor's *essay on Uses and Trusts*, *fol.* 558. See also *Loyd* v. *Spillet*, *post.* 2 *vol.* 149. Here we must observe, that if a person pays a *valuable* consideration for an estate, and by some defect or omission in the conveyance of the purchased lands to him the *legal* estate is not properly conveyed, in this case tho' the consideration could not create an *Use* by way of covenant to stand seised, yet the *vendor* would be considered a *trustee* for the purchaser. See *Pollexfen* v. *Moor*, *post.* 3 *vol.* 273.

2 covenant

covenant to stand seised: The settlement therefore must stand.

Brown v. Jenks.

The second question is, If it be a valid settlement, whether the creditors can claim any benefit under the settlement.

The assignee can claim no more benefit than *Roger Williams* himself, which is the profits of this real estate, for the life of the bankrupt.

The only question then is on the term of 99 years.

After the limitation to the wife for her jointure, then the settlement goes on and limits it to the use of trustees, their executors, &c. for the term of 99 years for such uses as herein and hereafter expressed.

It has been objected by the plaintiff's counsel, as here is no declaration of the trusts of the term, that it is a resulting trust for the husband, and as undisposed of, in law and equity, results to the donor in the settlement.

In the case of voluntary settlements and wills, if there is no declaration of the trust or a term, it results to the donor; otherwise where it is a settlement for a valuable consideration, and in the nature of a contract for the benefit of a wife, and of the issue.

It has been determined so, in the case of voluntary settlements and wills: but then the question will turn upon this, Whether it is not a settlement for valuable consideration, and in the nature of a contract for the benefit of the wife for her jointure, and a provision for the benefit of the issue, which in this case it certainly is and therefore, as to this, the assignee can be in no better condition than the bankrupt himself.

The court always takes agreements of this kind according to the nature of the agreement itself; the limitation to the sons after this term would not be worth half a crown, if the plaintiff's objection should prevail, which would overturn and defeat the uses of this settlement, and therefore if the husband had been the plaintiff in the cause, the court would have considered it as a trust term only to attend the inheritance according to the limitations in this settlement.

A limitation in a settlement to a husband for life to trustees to preserve, &c. to the wife for life for her jointure, and after the decease of both, to trustees for 99 years, on such trusts as hereafter expressed, and after the determination of that estate, to the first and every other son in tail. No declaration of the uses of the term. The court always takes agreements of this kind according to the nature of the agreement, and therefore consider it only as a trust term to attend the inheritance according to the limitations in this settlement.

In the case of *Uvedale* v. *Halfpenny*, before Sir *Joseph Jekyll* 2 *Will.* 151. *the trustees to preserve the contingent remainders were placed after a limitation of an estate tail to the son*, and yet he decreed the settlement to be rectified without any evidence of the fact, or intention of parties as to the placing of the limitations (1). [192]

The present is a thing of the same kind, in the reasoning of it, besides the words themselves will warrant that construction:

(1) So *Kentish* v. *Newman*, 1 P. W. 234. *Targus* v. *Puget*, 2 Vef. 194. *Worsley* v. *Earl of Granville*, *ibid.* 333. See *Ridout* v. *Dowling*, post. 419.

On

Brown v. Jones.

On the whole, the plaintiff is intitled only to the interest the husband has in the estate, which is but for his life; and decreed accordingly.

Walker and Others v. *Burrows*.

November the 6th, 1745.

Vide under the Division, Rule as to Assignees.

July the 31st, 1749.

Grey v. *Kentish*.

Vide title *Baron and Feme, under the Division, Rule as to a Possibility of the Wife.*

January the 22d, 1753.

Case 100.

Ex parte Coysegame.

1 *Cooke*'s B. Laws 323, S. C. and more fully stated.

A bond given to *A.* in trust to secure the payment of an annuity of 40*l.* during the joint lives of Sir *Edward Smith*, and petitioner the bankrupt's wife; he delivers up the bond upon his last examination; she applies to the court, and prays the assignees may deliver the bond to her trustee, and that the arrears of the annuity and all future payments may be made to her.

THE petitioner in 1751 married *Coysegame*, who is now a bankrupt, and at the time of his last examination, he delivered up with the rest of his estate a bond which was given to *A.* in trust to secure the payment of an annuity of 40*l.* a year to the petitioner, during the joint lives of Sir *Edward Smith* and the petitioner.

She brought a portion of 500*l.* to the bankrupt in marriage, and has nothing to subsist upon but this annuity, and prays by her petition, that the assignees may deliver the bond to her trustee, and that the arrears of her annuity, and all future payments may be made to her.

Lord Chancellor ordered it accordingly.

Lord Chancellor ordered accordingly, considering the creditors as standing in the place of the husband, and not intitled any more than he would have been, in case he was no bankrupt, to the annuity, without making a provision for her.

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Where a bond is given to a trustee for the benefit of a wife, and husband becomes a bankrupt, the assignees cannot bring an action, for by 1 *Jac.* 1. assignees can only have the like remedy to recover a debt, as the bankrupt himself might have had, the word party in the act being meant of the bankrupt.

For the assignees under the commission it was insisted, that notwithstanding the husband and wife must have brought the action in the name of the trustee of the bond for the annuity, yet, according to the opinion in *Miles* v. *Williams et ux.* 1 *Will.* 255. where a bond was made to *A.* in trust for *B.* who becomes a bankrupt, the assignees may bring the action in their own name, though *B.* must have brought it in the name of his trustee; and this shews that in point of law they are considered as having the absolute property for the benefit of the creditors.

The obiter opinion in *Miles* v. *Williams* and his wife, 1 *Will.* 255. denied by *Lord Chancellor* to be law.

But *Lord Chancellor* said, he did not remember there was any precedent for such an action by assignees, where a bond was given to a trustee for the wife's benefit, and not to herself: and as this opinion in 1 *Will.* was not upon the principal point in the case, but *obiter* only, his Lordship denied it to be law, and thought clearly by the manner of wording the clause, relating to the

the commissioners power of assignment of a bankrupt's effects, 1 *Jac.* 1. that assignees can only have the like remedy to recover a debt as the bankrupt himself might have had; the words, *as the party himself might have had*, in the conclusion of that clause, appearing to him to be meant of the bankrupt. And therefore ordered the bond to be delivered by the assignees to the petitioner, and the arrears and future payments of the annuity to be paid to her, for her separate use (1).

Ex parte COYSEGAME.

(1) Vide *Bosville* v. *Brander*, 1 P. Wms. 458. *Grey* v. *Kentish*, post. 280. *Worral* v. *Marlar*, and *Bushnam* v. *Pells*, 1 Cox's P. Wms. 459. *Jewson* v. *Moulson*, post. 2 vol. 417. *Pryor* v. *Hill*, 4 Bro. Cha. Rep. 139.

(Z) *What is, or is not, an Act of Bankruptcy.*

June 11th, 1743.

In the Matter of *William Gulston* a Bankrupt; upon the Petition of *William Gulston*, and a cross Petition of *George Dale* and Others.

Case 101.

S. C. ante 139.

Where there is a doubt of the bankruptcy, and the bankrupt is out of the kingdom, the court will not supersede the commission upon petition, but send it to trial; but where the bankrupt is at home, the court will send it back to the commissioners, to consider, if on evidence they can declare him a bankrupt or not.

MR. *Gulston* residing in the island of *Barbadoes*, on the 20th of *May* last preferred his petition to *Lord Chancellor*, thereby stating, that he being a merchant in *London* traded to *Barbadoes*, and other places, and having some years ago a considerable real estate devised to him in the island of *Barbadoes*, did, soon after he had taken possession thereof, put the same under the management of an agent there, for his greater convenience of resorting to this kingdom, and carrying on his trade and business here: that in 1737 he resided in this kingdom, and negotiated his business in a publick manner as a merchant, and never committed any act of bankruptcy; but finding that he was much imposed upon in the management of his estate at * *Barbadoes*, he therefore, in order to make the most thereof, determined to remove thither with his family sometime about the latter end of the year 1737, and his intention and determination of so doing was well known to all persons with whom the petitioner had any dealings, and was concealed from none of them, and particularly was well known to *George Dale*, who had several dealings with the petitioner, and was with him almost every day, and sometimes oftener, for six weeks, or two months before the time of the petitioner's so going abroad, and who had several goods packed up at the house of the petitioner, to be sent abroad with him: that the petitioner did, in *March* 1737, go over with his family to the island of *Barbadoes*, and had ever since resided there for the better management and improvement of his estate: that he had remitted to *George Dale* divers considerable sums of money to the amount of between three and four hundred pounds; and, notwithstanding this, *Dale* on the 21st of *February* last procured a commission of bankruptcy to be sealed against *Gulston*; but several witnesses having been examined before the commissioners, they were of opinion, that they ought not to declare him a bankrupt,

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Gulston v. Dale. rupt, and therefore the present application is, that the commission may be superseded.

The evidence to prove him a bankrupt before the commissioners was a porter, who swore, that, at the time *Gulston* went abroad, he ordered him to deny him to two different creditors, *Shipston* and another, and was conveying off his effects on shipboard: *Shipston*, being also examined before them, swore that at the time of *Gulston*'s going to *Barbadoes* he was very well apprised of his intention to leave the kingdom; that he saw him several times, and that *Gulston* never refused to see him when he asked for him.

It appeared by affidavits, that *Dale* was with *Gulston* a great many times before he went abroad, and was privy to it.

Mr. *Chute*, who was counsel for *Gulston*, submitted it to the court, that, if *Dale* had thought him a bankrupt at that time, he would certainly have applied for a commission then; but instead of doing that, he has since received four or five hundred pounds in discharge of his debt, and without any scruple applied it for that purpose, and now after five years acquiescence is attempting to make *Gulston* a bankrupt.

Mr. *Chute* insisted therefore, upon all these circumstances, that the commission should be superseded, or at least that an issue should be directed to try the bankruptcy.

He relied on a case mentioned in *Wrench*'s case, *Cro. Eliz.* 13. "There a process issued against *J. S.* to arrest him, who "kept his house to save himself from arrest, but afterwards went "to the market, and to other places, and when he heard again "of a new process out against him, he kept his house a second "time, but afterwards went at large: the question was, if he "was within the statutes of bankruptcy; and all the court held "he was not, because he used to go at large, and it might be [195] "that his policy would not prevent the serving of the process, "for he might be met withal unwittingly."

Mr. *Hume Campbell* of the same side cited *Hopkins* v. *Ellis*, *Salk.* 110. "Where it was held by *Holt* Chief Justice, that if "*H.* commits a plain act of bankruptcy, as keeping house, *&c.* "though he after goes abroad, and is a great dealer, yet that will "not purge the first act of bankruptcy, but he will still remain "a bankrupt." But if the act was not plain but doubtful, then going abroad and dealing, *&c.* will be an evidence to explain the intent of the first act; for if it was not done to defraud creditors, and keep out of the way, it will not be an act of bankruptcy within the statute (1). Also if after a plain act of bankruptcy he pays off or compounds with all his creditors, he is become a new man.

Mr. Attorney General for the cross petition;

Mr. *Dale*'s debt was originally 6000 *l.* and amounts now to 5500*l.* Some time in the year 1737 *Gulston* ordered himself to be denied to his creditors, and not only that, but left the kingdom and went abroad.

(1) *Woodier*'s Case. Bull. Ni. Pri. 39. *Raikes* v. *Poreau*, 1 Cooke's B. Laws 95.

The

The creditors, imagining that something beneficial might turn out, have waited all this time, in hopes Mr. *Gulston* might be enabled to pay them; but concluding now that by staying they may make bad worse, have agreed to take out a commission of bankruptcy. GULSTON v. DALE.

There are two sorts of bankruptcy described under the statute of the 13th of *Eliz. ch.* 7. and the 1st of *Jac. ch.* 15 *A beginning to keep his house, or a departing from his dwelling-house, to the intent or purpose to defraud or hinder any of his creditors of the just debt or duty of such creditor or creditors, or whereby his creditors may be defeated or delayed for the recovery of their just and true debts.*

Lord Chancellor: In consideration of Mr. *Gulston*'s being out of the kingdom, I think it very proper to direct an issue to try if he was a bankrupt before the taking out of the commission. If he had been in *England*, I should have been of opinion to refer it back to the commissioners, to consider upon the evidence before them, whether they would declare him a bankrupt.

His Lordship ordered, that the petitioners do forthwith proceed to a trial at law in the court of King's Bench in *London*, on the following issue: Whether at and before the issuing of the commission of bankruptcy against *William Gulston*, he was a bankrupt within the true intent and meaning of the several statutes made and now in force concerning bankrupts? And ordered that Mr. *Gulston* should be at liberty from time to time to inspect the commissioners' proceedings, and to take copies or extracts thereof as he shall think proper; and after the trial shall be had, any of the parties are to be at liberty to apply to his Lordship for further directions.

March the 28th, 1747. Last Seal after H. T. [196]

Lingood v. *Eade*.

A Motion was this day made on behalf of *Lingood* for a new trial, on a suggestion that the bankruptcy was found intirely upon the evidence of *Vaughan*, an attorney, who gave a quite contrary testimony from what he had done on a former trial in the court of Common Pleas.

Case 102. *Ex parte* Lingood, post 240. part of S. C.

Lord Chancellor: Lord Chief Justice *Lee* has informed me that the evidence of *Lingood*'s bankruptcy was very strong, and did not depend on Mr. *Vaughan* only, and that the jury found him a bankrupt without going from the bar; and as I am thoroughly satisfied with the account the Chief Justice has given me, I shall deny the motion.

Upon a former trial before Lord Chief Justice *Willes*, where the bankruptcy of *Lingood* came in question, he was of opinion that a person's absconding to avoid an attachment upon an award

Absconding to avoid an attachment upon an award for non-delivery of goods pursuant to the award, is not an act of bankruptcy within the stat. of *Jac.* 1. c. 15. but it must be a departing from the dwelling house to avoid the payment of a just debt, and not the delivery of goods, for that is a duty only.

Langood *v.* Eade.

for non-delivery of goods pursuant to the award, is not an act of bankruptcy, because it is not within the words of the statute of *Jac.* 1. *ch.* 15. which makes it an act of bankruptcy in a person to keep out of the way, or depart from his dwelling-house in order to avoid the payment of a *just and true debt only*, and not the delivery of goods, for that is a duty only: And *Lord Chancellor* declared that he thought the determination of Lord Chief Justice *Willes* a very right one, and that he was very well warranted by the words of the statute in the distinction he made between absconding to avoid a debt, and absconding to avoid a duty only.

December the 24th, 1747.

Ex parte Meymot.

Case 103.

A commission of bankruptcy taken out against the petitioner, who insisted that, as he is a clergyman, he is not liable to become bankrupt within the intent of any of the bankrupt statutes. *Lord Chancellor* would not supersede the commission, or direct an issue but left the petitioner to his action at law.

THE petitioner applies to supersede a commission of bankruptcy taken out against him, insisting that, as he is a clergyman, and is now, and hath been ever since 1729, rector of the parish church of *Normanton* in *Derbyshire*, he is not liable to become bankrupt within the intent and meaning of any of the statutes made concerning bankrupts.

Mr. *Brown* for the petitioner cited the 21 *Hen.* 8. *c.* 13. *s.* 5. "Whereby 'tis enacted that no spiritual person, secular, or regular, of what estate or degree soever, shall from henceforth "by himself, nor by any other for him, nor to his use, bargain "and buy, to sell again for any lucre, gain or profit, in any "markets or fairs, and other places, any manner of cattle, corn, "lead, tin, hides, tallow, fish, wool, wood, or any manner of "victual or merchandize, what kind soever they be of, upon "pain to forfeit treble the value of every thing by them, or by "any to their use, bargained and bought to sell again, contrary "to this act, and that every such bargain and contract hereafter "to be made by them, or by any to their use, contrary to this [197] "act, shall be utterly void and of none effect, and the one half "of every such forfeiture to be to the King, and the other half "to him that will sue for the same."

And argued, that as this act passed before any statute of bankrupt, and is still in force, no subsequent act could ever intend to include a spiritual person under the general words of the bankrupt acts; and as by these acts he is to be examined upon oath with regard to the discovery of his estate, it would oblige the petitioner to accuse himself, and lay him open to the penalties of the statute of *Hen.* 8.

Mr. *Wilbraham* of the same side said, The clergy have many privileges, some belonging to their persons, and some to their ecclesiastical benefices; therefore though in many cases where persons hold lands and tenements, by reason whereof they are liable to be elected to offices, as a reeve, bailiff, *&c.* yet the clergy are discharged from such services by reason of their function, and there is a writ in the *Register* which lies for their discharge, *Reg.* 187. *b. recites quod clerici infra sacros ordines constituti non eligantur ad officium.* And Lord *Coke*, 2 *Inst.* 2 & 3. upon *Magna Charta*, speaking of the privileges of the clergy, lays it down

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down that they are not to be chosen into any temporal office; and in 1 *Ventr.* 105. there is the following case: One Dr. *Lee*, having lands within the level, was made an expenditor by the commissioners of sewers in the county of *Kent*, whereupon he prayed his writ of privilege to the court of King's Bench, and it was granted; for, says the *Register*, *Vir militans Deo non implicetur in negotiis secularibus*, and the ancient law is, *quod clerici non ponantur in officia*.

This was the rule as established by the common law; but it has been said the statutes of bankrupts are general, and therefore the clergy ought not to be exempted, but then the 21 of *Hen.* 8. prohibits this order of men from exercising any sort of trade or merchandize, by buying and selling again, with a view to prevent them from being diverted from the proper business of their function, and their contracts are *ipso facto* void with a severe penalty.

Those laws that have the sanction of a penalty annexed to them, are more regarded than acts of parliament, which are merely prohibitory, without any penalty.

Can it be intended, when by a former act the legislature had prohibited the clergy from exercising any trades, that they meant to include them under the general words *person and persons* in the bankrupt acts? There is not a word in these acts that seems to comprize the clergy.

General words in an act of parliament may be restrained, when the reason of the law seems to require it. In the case of *Long* v. *Baker*, 1 *Roll. Rep.* 202. it is laid down as a rule in the construction of statutes, that a general law does not make that good, which was disabled by a particular statute before; and in *Hob.* 346. the case of *Sheffield* v. *Ratcliffe*, he says, Judges have a power in the construction of statutes to mould them to the truest and best use according to reason and convenience. Acts, general in words, have been construed to be but particular, where the intent was particular. *Plowd.* 204. *Stradling* v. *Morgan*; for though the statute of *H.* 7. of fines be conceived in general terms, and will bind corporations in general, yet by construction of law the successor of a parson, vicar, or any other sole corporation, shall have five years to make his claim; for if by their laches they should bind their successors, it would cause a diminution of ecclesiastical livings; and therefore by construction of the general law they are excepted. 11 *Co. Magdalen College Case*, 71. *a*. [198]

Can the bankrupt acts be said to intend *the clergy*, when they describe persons using the most secular employments which are prohibited to the clergy, and to mean those very persons which they do not describe, but who by the statute of *Hen.* 8. are forbid to fall under that description?

If this had been the construction, there must have been some instances; and where the penning of an act is dubious, long usage is a just medium to expound it by, for *jus et norma loquendi* is governed by usage.

If the petitioner should be adjudged a bankrupt, what must be done? Can the commissioners examine him touching an act

 of

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of bankruptcy? This is not to be done, without examining into his buying and selling; this subjects him to a forfeiture, and the bankrupt acts could never intend the power of commissioners to examine, should be so extensive, as to enable commissioners to examine persons, who, if they discover, must subject themselves to a forfeiture.

Could the commissioners assign over his living? No, for the assignee must either have the whole or none; so that there can be nothing left for the performance of divine service in this case, which is, of itself, an argument it was not the intention of the bankrupt acts to include spiritual persons; besides, he may defeat such an assignment at any time, for he may resign, and is not obliged to keep a curate.

And in another instance of sequestring a living, the law has provided that enough must be left of the benefice for the cure, that the parishioners may not be without a person to perform divine service; and therefore in cases of debts, if the sheriff returns that a defendant is *clericus beneficiatus nullum habens laicum feodum*, he can do no more, but then process must go to the bishop to sequester his living. And in such case, as 'tis said in 2 *Mod.* 256. *Walwyn* v. *Aubery*, the bishop may retain to supply the cure, and pay only the residue.

Here there can be no such provision, and therefore this becomes a question of conveniency. No general inconvenience can arise from superseding the commission, as this is the first instance since the bankrupt acts; but there may be great inconvenience, if it should not be superseded, because the cures of such clergymen cannot be seized.

Mr. Attorney General, of counsel for the petitioning creditor in support of the commission, said, the trading of the petitioner is a partnership with a potter in *Staffordshire*, and there is no dispute either as to the trade or act of bankruptcy; for Mr. *Meymot* has not ventured to produce any affidavit to contradict these facts.

[199] *Lord Chancellor* stopped Mr. Attorney General, and declared, if he could shew him that the petitioner had committed a plain act of bankruptcy, and had traded, he would not supersede the commission, because a man has the hardiness in a court of justice to say, I have been guilty of a breach of one law, and therefore release me from the breach of another.

The affidavits were then read which had been made to support the commission, and were very strong for that purpose.

Lord Chancellor: There has no question been made concerning the debt of the petitioning creditor, nor does Mr. *Meymot* contradict his trading, his having contracted this debt, or his absconding; and therefore the whole for my consideration is, whether a clerk in holy orders is liable to a commission of bankruptcy?

It is not proper for me to determine this question absolutely, because it is a mere matter of law; but I am of opinion I ought not to supersede the commission, or direct an issue, but leave the petitioner to his action at law.

If I was obliged to give an opinion, I am rather inclined to think he may become a bankrupt.

The

The statute of the 21 *H.* 8. is rather in the nature of a prohibition, and a prohibition will not exempt him from being a bankrupt; for if a man, with his eyes open, will break the law, that does not make void the contract. It is undoubtedly very improper for a person to say, I have broke the law, and therefore I am exempt from any remedy a creditor may have against me; and the petitioner cannot take advantage of the breach of one law, in order to avoid his being subject to another.

Ex parte MEYMOT. The statute of the 21 *H.* 8. will not exempt a clergyman from being a bankrupt, for he cannot take advantage of the breach of one law, to excuse him from the breach of another.

This is different from usurious cases, because then both the borrower and the lender are equally criminal, or the lender rather more criminal, as he takes the advantage of the borrower's indigent circumstances; but it is not so here, for the borrower only acts in breach of the law, and the lender may not know it at the time, or that he is a clergyman.

I will compare it to the case of a person who has dealt merely in smuggling and running of goods, though this is an offence, and contrary to an act of parliament, yet still it will be a trading within the meaning of the bankrupt acts, and such trader is liable to a commission.

Smuggling, tho' contrary to an act of parliament, is still a trading within the meaning of the bankrupt acts, and such person liable to a commission.

Next as to the penalty in the statute of the 21 *H.* 8.

I am inclined to be of opinion on this part of the act, that the contract shall be void, as to the parson himself only; for it would be a most extraordinary construction of the statute that the bargain shall be void for his own benefit; and it would be very mischievous to construe the act in such a manner.

A bargain or contract made by a parson, contrary to the statute of the 21 *Hen.* 8. *sec.* 5. is void as to himself only, and he alone is liable to the penalty of the act.

Many persons in this kingdom deal as graziers in buying of cattle, &c. the seller does not know a grazier to be a clergyman; shall the bargain then be void for the parson's benefit?

Suppose in the counties of *Surry*, *Kent*, &c. a parson buys a quantity of hops, can the vendor know that he buys to consume only in his house, and not to make a profit by retailing them again? If such a contract therefore was to be made void by the statute of *H.* 8. it would be a great hardship and inconvenience to vendors. I mention this to shew the mischiefs which would result from such a construction, and consequently this part of the act ought to be so construed, as to make it a penalty on himself only. [200]

Next as to the objection of going on with the commission, and examining the petitioner in relation to his estate and effects.

In the case I put before of smuggling, there is no examination of the commissioners, but will subject to penalties; and yet that is no reason why the commission should not proceed, for if the bankrupt has an objection to the question, he must demur to the interrogatories, and this court will judge of the question upon a petition; or if the bankrupt refuses to answer any question, and the commissioners commit him, and the delinquent brings an *habeas corpus*, the question must be set forth, particularly in

If a bankrupt has an objection to a question, he must demur to the interrogatories, and the court will judge of it upon a petition, or if he refuses to answer any question, and the commissioners commit him, and the delinquent brings an *habeas corpus*, the question must be set forth, particularly in the return to the *habeas corpus*, that the judges may judge, whether it was lawful or not.

Ex parte MEYMOT.

return to the *habeas corpus*, that the judges may judge whether it was a lawful queſtion or not, and notwithſtanding all this, the commiſſioners may undoubtedly examine as to his eſtate and effects, what he has, where it lies, *&c.*

The ſecond objection is, That a clergyman's is a ſpiritual preferment, and that his living is not within any of the ſtatutes relating to bankrupts.

This is indeed a more doubtful queſtion.

Eccleſiaſtical eſtates may be taken in execution, and upon a ſequeſtration likewiſe, and the method which is purſued in executions and ſequeſtration, may be followed upon a commiſſion of bankruptcy.

To be ſure there are, in the bankrupt acts, no words that relate merely to eccleſiaſtical eſtates, and therefore it is ſaid, if the whole living is ſeized, it may prevent ſerving the cure; but I do not know this would be the conſequence.

1ſt, A *fieri facias de bonis* iſſues againſt the parſon, and the ſheriff returns *nullum laicum feodum*, then a ſpecial *fieri facias de bonis eccleſiaſticis* iſſues to the biſhop, and he apportions a part to ſerve the cure, and the remainder is taken under the execution.

This rule has been conſtantly followed, but I do not know any particular law for it; and yet the court follows the rule of law analogically; but though they permit a ſequeſtration to iſſue, yet the biſhop in that caſe allots a ſufficient part of the living, for the ſervice of the cure.

I do not ſee (but I give no opinion) why the ſame method may not be followed under the commiſſion of bankruptcy, for it does not appear to me, that this would ſuperſede the biſhop's authority.

A parſon holds a living in right of the church, and it is not for his own benefit, but for the good of the church, he is preſented to it, and therefore may properly be ſaid to be *in autre droit*, as he is ſeiſed in right of the church, and in ſome reſpects may be compared to an executor who acts *in autre droit*, tho' the parſon's is not quite ſo ſtrong a caſe.

A peer or a member of the houſe of commons if they will trade are liable to a commiſſion of bankruptcy, otherwiſe as to infants.

*A commiſſion of bankruptcy formerly iſſued againſt a peer, an earl of *Suffolk*, for trading in wines, and though there may be ſome particular powers that commiſſioners of bankrupt could not exerciſe againſt a peer, yet, notwithſtanding this, he may be liable to a commiſſion of bankruptcy, if he will trade, and ſo may a member of the houſe of commons, though, while he continues a member, there are ſome particular powers of

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commiſſioners that cannot be exerciſed (1).

Lord *Cowper* and Lord *Macclesfield* carried it ſo far as to hold that infants were liable to acts of bankruptcy, but it has been ſince determined otherwiſe (2).

Upon the whole circumſtances of the caſe, I am of opinion, the commiſſioners ſhould proceed in the commiſſion; but ſo as not to prejudice any remedy the petitioner may have by an action at law (3).

(1) See *Stat.* 4 *Geo.* 3. *c.* 33.
(2) *Ex parte Sydebotham, ante* 146.
(3) See Ha[illegible] v. *Jones, Cowp.* 745.

Ex parte Hall.

December the 21st, 1753. Case 104.

A person's denying himself to a creditor who calls at eleven o'clock at night, is no act of bankruptcy, for it cannot be said to be done *with an intent to defraud his creditors*, which is the ingredient the acts of parliament require to make a man a bankrupt.

THIS was a petition on behalf of the bankrupt, praying to supersede the commission.

It appeared upon the affidavit of his wife, that two persons called one night at her husband's house after eleven o'clock, that they were both in bed at that time, and as he did not care to rise, she went to the window and asked who was there, and upon these persons refusing to mention their names, she said "Whoever ye are, if you will come to-morrow, or any other "proper time, you may speak with my husband."

The commissioners declared *Hall* a bankrupt on the evidence of these very persons one of whom was a creditor. They only swore generally, that they went upon the day mentioned in Mrs. *Hall*'s deposition and that they saw her husband go into his house, and followed him directly, and inquiring for him of his wife, she said that her husband was not at home, though they verily believed and apprehended that he was, and that he kept his house for fear of being arrested by his creditors.

Lord Chancellor: There is no pretence to say that *Hall* has committed an act of bankruptcy, for eleven o'clock at night is a very improper hour for creditors to call, nor can a man's denying himself at such an hour, be said to be done *with an intent to defraud his creditors*, which is the ingredient the acts of parliament require to make a man a bankrupt.

And as the statute of the 5 *Geo.* 2. has declared, "That if "it shall appear a commission is taken out fraudulently or ma-"liciously, that then the *Lord Chancellor*, &c. for the time being, "shall, and may, upon the petition of the party grieved, examine "into the same, and order satisfaction to be made to him, for the "damages by him sustained; and for the better recovery thereof "may, in case there be occasion, assign the bond (meaning the [202] "bond before mentioned, which the petitioning creditor gives to "the *Lord Chancellor*, &c. before the granting of the commission, "in the penalty of 200*l.* conditioned for proving his debt, and "also for proving the party a bankrupt, and further prosecu-"tion of the commission) to the party petitioning, who may sue "for the same in his name; any law, custom, or usage to the "contrary notwithstanding."

Referred to a master to settle the costs and ascertain the damages Mr. Hall has sustained, and if the petitioning creditor does not within a fortnight pay the same, the bond to be assigned to be put in suit against him.

I shall therefore order, that it shall be referred to a Master to settle the costs, and to ascertain the damages Mr. *Hall* has sustained, and if the petitioning creditor does not within a fortnight after the Master's report of what is due for costs, and likewise for damages, pay the same to Mr. *Hall*, I will, upon his application to me, direct the bond to be assigned to him, to be put in suit against the petitioning creditor, where at law, the jury may, if they think proper, give to the value of the whole penalty in damages.

N. B.

Ex parte HALL.

N. B. His Lordſhip ſaid, the circumſtances of this caſe were ſo flagrant, that if any thing of the ſame ſort ſhould ever be attempted again, he would certainly commit the attorney who ſued out the commiſſion.

(Aa) *Rule as to Sales before Commiſſioners.*

April the 11th, 1747.

Ex parte Green.

Caſe 105.

Advertiſements in caſes of ſales before commiſſioners of bankrupts ſhould not be general, but ought to name the hour as maſters do, and after the time expired, if commiſſioners are not gone, ſhould admit a better bidder, in order to give creditors as great ſatisfaction for their loſs as poſſible.

A Reverſionary eſtate of the bankrupt's has been put up to ſale before the commiſſioners, and, as uſual, it was agreed by the parties preſent, that the bidding ſhould be cloſed by a certain time though in the advertiſement for the meeting it was general, without naming any hour; one *Coward* was declared the beſt bidder: and after the time allotted by the commiſſioners for bidding was expired, a perſon of the name of *Eldridge* bid 10*l.* more; but the commiſſioners and aſſignees were of opinion, *Coward*, according to the terms of the bidding, was the purchaſer, and would not admit Mr. *Eldridge*'s to be a proper bidding.

Since the ſale at *Guildhall*, the reverſion is come into poſſeſſion, and now in point of value the eſtate is worth 500*l.* more than it was at the time of the bidding.

Lord Chancellor: I am of opinion, that commiſſioners of bankruptcy ſhould not be ſo extremely nice, as to preclude a perſon from being a purchaſer, becauſe he happens to have outſtayed the time ſet by the commiſſioners; and think this like the caſe of eſtates ſold before Maſters for payment of creditors, where they always advertiſe the ſale to be at a definite time, as between the hours of ten and twelve, becauſe they may not be under the neceſſity of ſtaying beyond that time; but if a perſon [203] comes to bid, even after that time, before the Maſter is gone, he is admitted notwithſtanding: and the advertiſements in caſes of ſales before commiſſioners of bankrupts ſhould not be general for a meeting in order to ſell a bankrupt's eſtate, but ſhould name the hour as Maſters do, and after the time expired, if the commiſſioners are not gone, they ought to admit a better bidder, in order to give creditors as great ſatisfaction for their loſs as poſſible; and as matters of bankruptcy are diſcretionary in this court, I ſhall never tie up a bidding to ſuch ſtrict rules; and I order the bidding to be opened again.

(Bb) *Rule as to Examinations taken before Commissioners.*

Eade v. *Thomas Lingood* a Bankrupt, and *Margaret Lingood* his Daughter, &c. May the 23d, 1747.

THE plaintiff had obtained an order to read the proceedings in the commission of bankruptcy, as an exhibit in his cause, and, amongst the rest, the examination of *Margaret Lingood* before the commissioners. Case 106.

An order had been obtained to read *inter alia* the examinations of *Margaret Lingood*, taken before the commissioners under *Thomas Lingood's* bankruptcy. They cannot be read, unless proved in the cause, that there were such examinations taken before the commissioners; for the proceedings in a commission of bankruptcy against *Thomas* are, as to *Margaret*, *res inter alios acta.*

It was objected by the counsel, that *Margaret Lingood*'s examination cannot be read where she is a defendant, unless it had been proved over again in the cause.

Lord Chancellor: Two questions have been made on the plaintiff's offering to read the examination of *Margaret Lingood.*

First question: Supposing the order had been sufficient, whether the plaintiff could have read her examination taken before the commissioners?

Now I am extremely doubtful, if the plaintiff could have read it even then.

The rules in respect to *vivâ voce* examinations are held extremely strict in this court: as for instance, in cases of wills, this court never suffers them to be proved by examinations of witnesses *vivâ voce*, for it is not sufficient to prove a signing and sealing, but the sanity of the person, and all other requisites under the statute, must be proved, and this cannot be done by *vivâ voce* examinations; because the defendant has a right to a cross examination of the plaintiff's witnesses.

I will put the case of an affidavit made to contradict an answer; suppose there the plaintiff should produce a copy of the original affidavit from the office, I never knew it allowed as sufficient.

The next question has arisen upon the order obtained by the plaintiff to read the proceedings under the commission of bankruptcy in the present cause, saving just exceptions. [204]

This order is obtained upon the same foundation as an order to read in one cause, the bill, answer, and the rest of the proceedings in another cause, where it is between the same parties; but such an order cannot be extended to a third person, who was no party to the first.

An order to read the proceedings in one cause in another, must be between the same parties.

Now *Margaret Lingood* is not at all bound by the proceedings in a commission of bankruptcy against *Thomas Lingood*, for as to her it is *res inter alios acta.*

Upon the whole, his Lordship would not admit this examination to be read, unless the plaintiff had proved in the cause, that there were such examinations taken before the commissioners.

The

Ex parte v. Langdon. Where one defendant is charged with a fraud, his deposition cannot be read for another, as it may tend to excuse him with regard to his own costs.

The bill here is brought against *Thomas Lingood*, charging a fraud against him, in pretending to have bought a copyhold estate with his daughters' money, when it was in fact with his own.

His daughters are made defendants in the cause, in order to reconvey the copyhold to the assignees under the commission against *Lingood*.

Mr. Solicitor General, counsel for the daughters, in excuse of their costs offered to read the defendant *Thomas Lingood*'s deposition, to shew that he led them into the mistake, by informing them that the purchase was made with their money.

Lord Chancellor refused to let *Thomas Lingood*'s deposition be read, because where one defendant is charged by the bill with a fraud, his deposition cannot be read for another defendant, as it will be an advantage to himself, and may tend to excuse him with regard to his own costs.

December the 24th, 1747.

Ex parte Parsons.

Case 107.

Ante 72. S. C.

Lord Chancellor on a former application limited Mrs. *Parson*'s examination before the commissioners to her son's trading only, but upon the present application, refused to restrain the commissioners from inquiring into any circumstances which may make him a trader.

LORD Chancellor upon a former petition had directed the commission of bankruptcy that had been taken out against Mr. *Parsons* the son of the petitioner should proceed, and the commissioners were allowed to go so far as to make a provisional assignment, but no warrant of seizure to issue, nor any advertisement to be published for the bankrupt's appearing and surrendring himself till further order.

Upon the commissioners proceeding in the commission, and examining Mrs. *Parsons* the petitioner and mother of the bankrupt, an application was made to *Lord Chancellor* before the long vacation, on the part of Mrs. *Parsons*, that the examination should be limited to her *son's trading only*, and *Lord Chancellor* did limit it accordingly.

The present petition is, that the commissioners may be restrained from asking a particular question mentioned in the petition, concerning *her son's trading*.

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Lord Chancellor said, he did not intend by the former order to restrain the commissioners from asking any question that might be relevant to *his* being a trader, or any circumstances relating thereto.

She was asked by the commissioners, whether her son was a trader or not, or had any concern in the brewhouse? and answered negatively. He would not therefore restrain the commissioners from inquiring into any circumstances which may make him a trader; as for instance, "Did your son assign over "any share he had in the brewing trade to you? For if she answers in the affirmative, that will shew he was a trader before he executed an assignment.

Suppose in the deeds themselves it should appear he carried on the trade with his mother, this will be a material evidence for the support of the commission.

His

His Lordship would not restrain the commissioners from examining Mr. *Parsons* concerning her son's trade, and therefore dismissed the petition, and said further that he would not make any order that Mrs. *Parsons* should be at liberty to be attended by counsel upon her examination, as is prayed by the petition, because it may be made a precedent in other commissions, and he thought an inconvenience would arise if allowed in every case, and therefore only recommended it to the commissioners, in this particular instance, to indulge Mrs. *Parsons* with counsel, but would make no order for that purpose.

Ex parte PARSONS.

Lord Chancellor would not make an order that Mrs. *Parsons* should have counsel upon her examination, because it might be made a precedent in other commissions, and thought an inconvenience would arise, if allowed in every case.

Ex parte Bland. Case 108.

THE petitioner is a banker in *Lombard-street*, and had been summoned under the commission of bankrupt against *Lingood*, in order to be examined touching his trade and dealings with the bankrupt.

Mr. *Bland*, instead of attending the commissioners, petitioned *Lord Chancellor* that he might be examined upon interrogatories, and might have a copy of the interrogatories, and a month's time to prepare himself for this examination, and that the commissioners might be restrained from asking him questions touching notes given for money, or bank notes or goldsmith's notes, or money paid by him for bank bills, or cash notes of the petitioner or other bankers.

Mr. *Bland*, instead of attending commissioners, petitioned that he might be examined upon interrogatories, and have a copy thereof, and a month's time to prepare himself, and that the commissioners may be restrained from asking him particular questions in his business of a banker.

Lord Chancellor dismissed the petition upon the opening of the petitioner's counsel, without hearing the assignees' counsel, and said he would not limit or restrain commissioners in their examinations, for if he did it would be attended with expence and inconvenience from applications of this kind.

Lord Chancellor will not restrain commissioners in their examinations, as it would be attended with expence and inconvenience from applications of this kind.

The bare exchanging of notes with a bankrupt, or giving money for bank notes, cannot affect him as a trader with that bankrupt, and consequently Mr. *Bland* cannot be hurt by such a discovery, nor would he presume that the commissioners will ask such trifling and immaterial questions, and therefore would not direct the examination to be upon interrogatories.

The bare exchanging of notes with a bankrupt, or giving money for bank notes cannot affect him as a trader with that bankrupt.

(Cc) *Who are liable to Bankruptcy.*

Highmore v. *Molloy*. *December* the 11th, 1737. Case 109.

LORD *Chancellor*: I am inclined to think a pawnbroker within the several statutes concerning bankrupts, and especially within the general words of the 39th clause of the 5th of *Geo.*

Pawnbrokers within the statutes of bankrupts, and seem particularly included in the general word *brokers*, in the 39th section of the 5th of *Geo.* 2. and so is a publick officer, as an exciseman, &c. if he will trade.

Sheppard v. Molloy.

Geo. 2. the words of which are, "Whereas persons dealing "as bankers, *brokers*, and factors, are frequently intrusted with "great sums of money, and with goods and effects of very great "value belonging to other persons: It is hereby further enacted "that such bankers, *brokers*, and factors shall be, and hereby "are declared to be subject and liable to this, and other the sta-"tutes made concerning bankrupts."

For though pawnbrokers are not expresly named, yet the general word *brokers* is the genus, and all other kind of brokerage the species.

His Lordship said in the same case, Though a man be a publick officer, as an exciseman, &c. yet, if he will trade, he makes himself subject to the statutes of bankrupts.

January 22d, 1739.

Ex parte Carrington.

Case 110. The daughter of a freeman of *London*, if she trades separately from her husband, may be a bankrupt.

A Commission of bankruptcy had been taken out against *Dorothy Jones*, as a widow. Her lying in gaol from the 8th of *November* (on an arrest) to the 4th of *January*, being two months, was the act of bankruptcy, on which she was declared a bankrupt.

The petition was preferred in order to supersede the commission, upon a suggestion of her being a married woman at the time the commission issued, and the wife of the petitioner.

Lord Chancellor: I am of opinion the taking out a commission against her as a widow, is but a misnomer at most; but if the petitioner thinks this a sufficient ground, I leave him at liberty to bring his action.

As *Dorothy* is admitted to be the daughter of a freeman of *London*, and appears plainly to be a separate trader, by the custom of *London*, she is clearly liable to bankruptcy, notwithstanding her coverture (1).

The petition dismissed.

(1) So *Lavie* v. *Philips*, 3 Burr. 1776. 1 Black. Rep. 570. S. C. 1 Com. Dig. 521.

August the 2d, 1744.

Ex parte Crisp.

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Vide under the Division, Rule as to Partnership.

December the 24th, 1747.

Ex parte Meymet.

Vide under the Division, What is or is not an Act of Bankruptcy.

February the 24th, 1752.

Richardson and *Gibbons*, Assignees of *Alexander Wilson* a Bankrupt. — — Plaintiffs.

Bradshaw, *Taylor*, and *Wilson*, — Defendants.

Vide under the Division, What is a trading to make a Man a Bankrupt.

Ex parte Williamson.

March the 26th, 1750.

Vide under the Division, Rule as to the Certificate of a Bankrupt.

(Dd) *Rule as to a Bankrupt's Allowance.*

October the 20th, 1744.

Ex parte Grier.

Case 111.

A bankrupt is not intitled to his allowance, till he has had his certificate.

THE petitioner *Ruth Grier*, the widow and administratrix of *John Grier*, against whom a commission of bankruptcy had been awarded, prayed that the assignees of the estate and effects of the bankrupt might be ordered to pay unto the petitioner the sum of 35*l.* being the remainder of the 5*l. per cent.* unreceived, which the petitioner insists *John Grier* the bankrupt was intitled to as his allowance, in respect to the sum of 800*l.* recovered in from his estate, or that she might have such other allowance as he was intitled unto at his death.

Lord Chancellor: I am of opinion on the construction of the clauses in the act of parliament made in the fifth year of the present king, that though *Grier* the bankrupt did surrender and conform, yet that he was not intitled to the allowance given to bankrupts, unless he had had his certificate; for if the creditors should consent to give it him before, it would be of no service, as they might take it from him again the next moment; for it would be liable in his hands to satisfy any creditors, till he is entirely cleared by the certificate. [208]

His Lordship therefore ordered the petition to be dismissed.

Ex parte Trap.

December the 24th, 1747.

Case 112.

A bankrupt's allowance under the act of parliament is a vested interest, and, if he dies, will go to his representative.

THE petitioner is the representative of a bankrupt, whose estate had paid a neat 10*s.* in the pound to his creditors under the commission, and thereby became intitled to an allowance of 5*l. per cent.* provided the 5 *per cent.* did not amount in the whole to above the sum of two hundred pounds. The commissioners directed the assignees to pay the bankrupt the sum of 163*l.* being within the sum, his estate amounting to 4000*l.* but before the assignees had paid it, the bankrupt dies, which was the reason they did not think fit to pay it to the representative of the bankrupt, without the sanction of the court.

Lord Chancellor of opinion it vested in the bankrupt, and the petitioner consequently as his representative intitled to the 163*l.* (1).

(1) *Ex parte Caldot*, post. 209. post. 3 vol. 814. S. C.

February the 2d, 1748.

Ex parte Stiles and Pickart.

Case 113.

Bankrupts are not intitled to their allowance under the 5th of the present king, till a final dividend is made, for it cannot be seen before, whether they will be intitled to any allowance at all.

THE petitioners by their petition set forth, that they had paid a dividend of 10*s.* in the pound, clear of all expences, under a joint commission; and therefore prayed they may have the allowance they are intitled to under the act of the fifth of the present king.

A separate creditor, who by order of the Lord Chancellor was admitted to prove her debt under the joint commission, opposes it, and insists the bankrupts are not intitled, as their separate estate is so deficient, as not to produce 2*s.* 6*d.* in the pound, and that the bankrupts cannot receive the allowance under the act of parliament, till they have paid all their creditors, as well separate as joint, twenty shillings in the pound.

Lord Chancellor: This application is premature, the commission issued no longer ago than in *June* last, no final dividend has been made, and before that time any creditor may come, either joint or separate, to prove debts.

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Upon an affidavit of a creditor that he has not read the *Gazette*, he will be admitted so as not to disturb a former dividend, nor can commissioners proceed to make a second till he is brought up equal to the creditors under the first.

And even upon the common equity of this court, if creditors will make an affidavit that they have not read the *Gazette*, they will be admitted, so as not to disturb the former dividend, and by that means must, in the first place, be brought up equal to the creditors under the former dividend, before the commissioners can proceed to make a second.

So that, till after a final dividend, it cannot be seen whether the bankrupts will be intitled to any allowance at all, for the act of parliament directs that the neat produce of his estate shall be sufficient to pay the creditors of the bankrupt, who have proved their debts under the said commission, the sum of ten shillings in the pound, *over and above such allowance.*

Therefore to grant this petition would be a dangerous precedent, and for this reason I dismiss it, but so as not to prejudice any allowance they may be intitled to after a final dividend.

November the 2d, 1754.

Ex parte Calcot, and Others.

Case 114.

S. C. post 3 vol. 814.

The representative of a bankrupt who had in his life-time divided 10*s.* in the pound is, as standing in his place, intitled to the allowance.

THE petitioner is an administrator of one *Tirrell*, a bankrupt, his application to the court for the bankrupt's allowance under the act of parliament, he having made a neat dividend of 10*s.* in the pound.

Lord Chancellor ordered the assignee out of the effects in his hands should pay the allowance to the petitioner, at the rate of 5*l.* *per cent.* upon the money got in from the bankrupt's estate, not exceeding the sum of 200*l.* (1).

(1) *Ex parte Trap, ante* 208.

(Ee) *Rule as to Solicitors in Bankrupt Cases.*

Ex parte Holliday.

June the 17th, 1742.

Case 115.

The court cannot, upon petition, make the clerk of the commission pay costs of suit, for not attending to give evidence at a trial, by reason of which the bankrupt was acquitted, the remedy lying at law.

A Petition against *Phelps* the clerk, in a commission of bankrupt for not attending a trial at the assizes upon an indictment against the bankrupt for concealment, notwithstanding he was served with a *subpœna* for that purpose; and praying that the whole costs of the suit may be paid by *Phelps*, as the petitioner apprehends that the acquittal of the bankrupt was owing to the want of *Phelps's* evidence.

Lord Chancellor: This is not a matter proper for me to determine in a summary way, or to interfere in a proceeding before a judge of oyer and terminer.

If the petitioner has really sustained any damages in this trial for want of Mr. *Phelps's* evidence, he may proceed against him by way of indictment or information, and recover damages for this neglect of Mr. *Phelps*; and therefore as to this part I shall dismiss the petition, as I have no jurisdiction at all in a matter of this kind. [210]

Ex parte Whitchurch and Others.

June the 7th, 1749.

Case 116.

Ante 91.

Where a sollicitor carries on suits for an assignee, without the authority of the majority in value of the creditors, the estate of the bankrupt is not liable to his bill for such suits.

HIS Lordship, by a former order in petitions of bankrupts, referred it to a Master to tax Mr. *Skurray's* bill as sollicitor, in suits carried on in this court by the assignees of *Halliday's* bankruptcy.

The Master taxed the bill accordingly, and reported so much due to him on account of these suits.

Some of the creditors of *Halliday* in behalf of themselves and the rest of the creditors, take exceptions to this report, because the assignees engaged in these suits of their own accord, without a previous meeting of the creditors to impower them to commence suits in equity, pursuant to the directions in a clause in the 5 *Geo.* 2. intitled, *An act to prevent the committing of frauds by bankrupts.*

"Provided always, that no suit in equity shall be commenced "by any assignee or assignees, without the consent of the major "part in value of the creditors of such bankrupt, who shall be "present at a meeting of the creditors, pursuant to notice to be "given in the *London Gazette* for that purpose."

Lord Chancellor: The exception must be allowed, and as he was employed by the assignee, Mr. *Skurray* has a personal remedy against him, but since he acted without the authority of the majority in value of the creditors at a previous meeting for that purpose, the estate of the bankrupt is not liable to this demand.

(Ff) *Rule as to the Sale of Offices under a Commission of Bankruptcy.*

August the 3d, 1749. *Ex parte Butler* and *Purnell*, the Assignees of *Edward Richardson* a Bankrupt.

Case 117. S.C. Amb. 73. Post 215. The bankrupt, in 1746, purchased the office of the under marshal of the city of *London* for 900*l.* a salary annexed to it of 60*l.* payable half yearly, and a freedom of the said city, worth annually 25*l.* *Richardson*'s effects not amounting to 5*s.* in the pound, his assignees applied to the lord mayor and court of aldermen, for liberty to sell the bankrupt's office; but he being present in court, and refusing to consent, they declared that they could not alienate it without his consent. The present application, that this office may be forthwith sold, and that the lord mayor, &c. may be indemnified in accepting such alienation, on the assignees paying the usual alienation fine. The *Lord Chancellor* of opinion, that assignees might sell this office of under marshal, and that it is not within the statute of *Edw.* 6. as it does not concern the administration of justice.

EDWARD *Richardson* in 1746, and for some years before, followed the business of a victualler in the city of *London*, and having acquired some money, and borrowing more, in *Sept.* *1746, purchased the office of the under marshal of the said city for 900*l.* two thirds of which was paid to the then lord Mayor, and the other third to the said city.

[*211] To the office is annexed not only a yearly salary of 60*l.* payable half yearly out of the chamber of the city, but also a freedom of the said city every year, worth 25*l.* and considerable perquisites besides.

On the 22d of *April* 1749, a commission of bankruptcy issued against him; there is not sufficient to pay 5*s.* in the pound from the effects in the hands of the assignees, and therefore they applied to the lord Mayor and court of aldermen, for liberty for them to sell the bankrupt's office, but he being present in that court, and asked if he would consent to such sale, absolutely refused to do it, whereupon the court of aldermen declared, that they could not alienate it without the bankrupt's consent.

The petitioners apprehending the interest of the said office is vested in them, and that as he might have sold on the usual alienation fine, insist they, as standing in his place, have a right to sell the same for the benefit of the creditors, without the bankrupt's consent, and therefore pray, that the office of under marshal may be forthwith sold for the benefit of his creditors, and that the lord Mayor and court of aldermen may be indemnified in accepting of such alienation on the petitioners paying into the chamber of the city of *London* the usual alienation fine.

At the time of *Richardson*'s admission, it is expressed in the appointment, that he shall have, hold, exercise, and enjoy the said office with all fees thereunto belonging, so long as he shall well and honestly use and behave himself therein.

The business of the under marshal is, for himself and his men diligently to attend the streets, and carry all such vagrant persons as they shall find within the city and liberties to *Bridewell*,

Bridewell, or otherwise to give punishment to them according to law. Serjeant Butler.

He is likewise to see that the scavengers in every ward cause the streets and lanes to be duly swept and paved, and that the rakers of the wards carry away the soil.

It is also required of him, that he should ride or go abroad in the night time, twice in every week at least, to see the watches duly kept.

There are other duties belonging to his office of the like kind, but the before-mentioned are the most material.

The principal question is, Whether the place of under marshal is an office that concerns the administration of justice, and whether by the statute of the 5 *&* 6 *Ed.* 6. *c.* 16. it is or is not lawful to sell such an office.

If it be an office which falls within the description of the above statute, then the counsel for the bankrupt insisted it cannot be sold, because by the statute "*If an officer concerning the administration of justice, or king's treasure, castles*, &c. *sell, or take any promise or assurance, to have any money or profit for any office, or deputation, he shall forfeit his office, and the contract shall be void, and the buyer or promiser*, &c. *shall be disabled to hold the said office.*" [212]

The office of serjeant at mace is unsaleable, as it concerns the execution of justice: The same as to a sworn clerk of the six clerk's office.

The counsel for the bankrupt likewise cited the case of *William Lowfield, who in* 1722, *in consideration of the sum of* 400l. *was by the lord mayor and court of aldermen of the city of* London *admitted to the office of a serjeant at mace, to hold* quamdiu se bene gesserit. *The duty of his office is to execute the writs and processes directed to the sheriffs of* London, *and no salary but what he gets by the execution of such process.* William Lowfield *became a bankrupt, the assignees petitioned Lord Chancellor* King *to have his place sold for the benefit of his creditors, and on the* 10th *of* April, 1733, *the matter of the petition came on, when his Lordship was pleased to declare, that the place was not saleable, as it concerned the execution of justice, and therefore dismissed the assignees' petition.*

The place of Mr. *Bristow* one of the sworn clerks of the six clerks office, who was discharged from his imprisonment by the late act for the relief of insolvent debtors, was held not saleable.

N. B. It appeared by the affidavits which were read in the petition, that 150 *l.* only of the creditor's money had been laid out by the bankrupt in the purchase of the said office.

Lord Chancellor: This is a matter of very great consequence, for when a man is likely to become bankrupt, he may sell all his stock in trade and effects, and invest the produce in one of these *saleable offices*, and in that manner cheat his creditors.

There are two questions which naturally arise.

1st, Whether this office is of such a nature, that the creditors can lay hold of the salary belonging to it?

2dly, Whether the creditors are bound to wait for these profits as they accrue, or may sell them by anticipation?

 I am

Ex parte Sutler.

I am of opinion, that this is clearly an office within the meaning of the 34 & 35 *Hen.* 8. *c.* 4. and 13 *Eliz.* *c.* 7.

The words of the preamble to the first act are, "Where divers and sundry persons, craftily obtaining into their hands "great substance of other men's goods, do suddenly flee to parts "unknown, or keep their houses, not minding to pay or restore "to any their creditors, their debts and duties, but at their own "wills, and consume the substance obtained by credit of other "men, for their own pleasure and delicate living, against all "reason, equity and good conscience." Be it therefore enacted, *That the Lord Chancellor of* England, *or Keeper of the Great Seal, the Lord Treasurer, the Lord President, Lord Privy Seal, and other of the King's most honourable Privy Council, the Chief Justices of either Bench, for the time being, or three of them at the least, upon every complaint made to them in writing, by any parties grieved, shall have power and authority by virtue of this act to take by their discretions, such orders and directions as well with the bodies of such offenders, as with their lands, tenements, fees, annuities, and offices, which they have in fee simple, fee tail, term of life, term of years, or in the right of their wives, as much as the interest, right and title of the said offenders shall extend to be, and may then lawfully be departed with, and to cause the said lands,* &c. *and offices to be appraised and sold, for satisfaction and payment of the said creditors.*

The office of under marshal is clearly within the description of the 34 & 35 Hen. 8. c. 4. and 13 Eliz. c. 7.

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The statute of the 13 *Eliz.* begins with a recital of the former act. *Forasmuch as notwithstanding the statute made against bankrupts in the 24th year of the reign of our sovereign lord King* Henry VIII. *those kind of persons have, and do still increase into great and excessive number, and are like more to do, if some better provision be not made for the repression of them; Be it enacted, That the Lord Chancellor or the Lord Keeper for the time being, upon every complaint made to him in writing, against such person being bankrupt, as is before defined, shall have full power, by commission under the great seal, to appoint discreet persons who shall take by their discretions, such order,* &c. *with the body of such person,* &c. *and also with his lands,* &c. *and cause the said lands, offices,* &c. *to be appraised and sold.*

This is an explanation of the former act, and changes the jurisdiction by vesting it in the Lord Chancellor or Lord Keeper only, the consideration of the former act is taken up, and is, as it were, incorporated into this; the most remarkable part is, *cause the said lands and offices,* &c. *to be appraised and sold*; and notwithstanding *Stone* and *Billinghurst* in their reading on these acts say, that only offices of inheritance are within the meaning of these words, yet I am of opinion this construction is contrary to the express words of the acts, for terms of years relate directly to offices, not in lands only, but all other offices.

An office quamdiu se bene gesserit, is an office for life.

Is this an office for life? It certainly is, for an office *quamdiu se bene gesserit*, has always been held to be an office for life, and as they express it in the *Scotch* law, it is what a person holds *aut per vitam aut culpam.*

It has been admitted at the bar, that if the bankrupt should not obtain his certificate, that the moment he receives any profit, from his office, it vests in his assignees.

But

But it is not therefore to be taken for granted, that every thing which does not immediately veſt in the aſſignees, is not liable to the creditors under a commiſſion of bankruptcy. *Ex parte* BUTLER.

I will put you a caſe, in which I ſhould not ſcruple to conſider a bankrupt as a truſtee for creditors.

Suppoſe a tradeſman is under a will made executor and reſiduary legatee, and before his bankruptcy collects in enough of the teſtator's effects, to pay debts, and particular legacies, and the remainder of the aſſets ſtood out in mortgages: the aſſignees would not in law be intitled to get it in, becauſe the bankrupt has it in *auter droit* as executor, and yet, if he refuſed, I ſhould certainly be of opinion the aſſignees under the commiſſion, notwithſtanding the legal intereſt is not veſted in them, *might by the aid of this court get in this part of the aſſets in the name of the executor, and would direct accordingly.

Where a bankrupt is an executor and reſiduary legatee, and has paid the debts, and particular legacies out of part of the aſſets, if he refuſes to collect in the reſt notwithſtanding the aſſignees have not the legal intereſt veſted in them, the court would aſſiſt them to get in the remainder in the name of the executor.

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I think clearly therefore, that the aſſignees may in this caſe by anticipation ſell the office of the under marſhal of the city of *London*, and that it is not within the ſtatute of *Edw.* 6. which concerns the execution of juſtice, and for this reaſon not like *Lowfield's* caſe that did plainly concern the execution of juſtice, and if it had come before me, I ſhould certainly have made the ſame order, as Lord Chancellor *King* did, that the petition ſhould ſtand diſmiſſed.

The office of under marſhal does not concern the execution of juſtice, but only the police of the city of *London*, and there have been laid before me ſeveral inſtances of acts of common council for the ſale of this office.

Another objection has been ſtarted by reaſon of the words of the act, which reſtrain it to ſuch a property as *a bankrupt may depart withal*, becauſe this muſt be done by the leave and intervention of the lord mayor and court of aldermen.

This is only a medium, though to be ſure, I have no authority to make an order on the lord mayor and court of aldermen, compelling them to accept of a ſale.

But what I ſhall direct here, is like the common caſe of renewals of leaſes: I cannot make deans and chapters, *&c.* grant leaſes, and yet ſuch orders are every day's experience, and the ſame likewiſe with regard to lords of manors in copyhold caſes.

His Lordſhip directed, that the aſſignees of *Edward Richardſon* ſhould agree with a perſon to ſell this office, and then propoſe ſuch perſon to the lord mayor and court of aldermen, as a purchaſer, and if they approved of ſuch purchaſer, the bankrupt was to attend the lord mayor and court of aldermen, and to ſurrender his office to them, to the end the purchaſer might be admitted thereto; and the money ariſing from the ſale of the office, was to be applied for the benefit of the creditors; and if the bankrupt refuſed to comply with this order, his Lordſhip declared he would commit him to the *Fleet* till he thought proper to comply.

P 3 N. B.

Ex parte Artess. If an officer of the army should become bankrupt, the court would lay their hands upon his pay, for the benefit of his creditors.

N. B. *Lord Chancellor*, in arguing this case, said, that if an officer in the army should become a bankrupt, he should have no doubt but he had a power to lay his hands upon his pay for the benefit of his creditors (1).

(1) *Contra Cathcart* v. *Blackwood*, 1 *Cooke's B. Laws*, 358. *Flarty* v. *Odlum*, 3 *Durn. & East.* 681. *Lidderdale* v. *Montrose*, 4 *Durn. & East*, 248.

December the 22d, 1749. this matter came on again.

Ex parte Butler and *Purnell*, the Assignees of *Edward Richardson* a Bankrupt.

[215] Case 118. S. C. ante 210.

The bankrupt being under marshal of the city of *London*, and refusing to surrender, the assignees obtained an order for disposing of the office; *B.* agrees with the assignees for the purchase of the office at 850*l.* and on the 17th of *October* last was presented to the court of lord mayor, &c. who approved of him, and were ready to take the bankrupt's surrender, but he refusing, was ordered to be committed for his contempt, and hath absconded ever since. The present petition that *Lord Chancellor* would order the court of lord mayor, &c. to admit *B.* in the room of *Richardson*. His Lordship said, he could not make the order upon the lord mayor, &c. to admit *B.* it was intirely discretionary in them, but recommended to the lord mayor, &c. upon the bankrupt's non-attendance, by which his office was forfeited, to dismiss him, and admit *B.*

AT the time of issuing of the commission, *Richardson*, as has been before stated, was possessed of the office of under marshal of the city of *London*, and had refused to surrender, or to let the assignees dispose of it, for the benefit of his creditors.

By an order of the 3d of *August* last, the assignees were to be at liberty to treat for disposing of the office, and after they had agreed with any person, were to propose him to the lord mayor and court of aldermen for their approbation, and if they approved of him, the bankrupt was ordered to attend them, and surrender the said office to the lord mayor and court of aldermen, to the end that such person might be admitted to the office in the usual manner.

Mr. *Buck* accordingly agreed with the assignees for the purchase of the office, at the price of 850*l.* and on the 17th of *October* last was presented to the court of lord mayor and aldermen, who approved of him, and were ready to take the bankrupt's surrender, but he refusing to do it, upon an application to *Lord Chancellor*, he ordered *Richardson* to be committed for his contempt, and a warrant issued accordingly, but he thereupon absconded, and hath kept out of the way ever since.

It was therefore prayed by the present petition, that his Lordship would make an order on the court of lord mayor and aldermen to admit Mr. *Buck*, in the room of *Richardson*, to the said office.

The court of lord mayor and aldermen did not think they were justified in admitting *Buck*, without an actual surrender of the bankrupt, and therefore the principal end of this application was, that they might be safe in doing it, and to supply the want of a surrender.

It appeared that a constant personal attendance was required in this office, and that by the rules and customs of the court of lord mayor and aldermen, the person who neglects or refuses to give such attendance, may be totally dismissed, and that in consequence thereof, the court may admit any person they think fit.

Where the legal interest of a copyhold is in one, and the equitable in another, the court can order the trustee to surrender, though cestuique trust refuses.

Lord Chancellor said, he was in doubt what directions he should give, for he was of opinion, that he could not make an order

upon the lord mayor and aldermen to admit Mr. *Buck*, as it was intirely discretionary in them who they would admit, and that he could not supply the want of a surrender here, as in the common case of a copyhold, where perhaps the legal interest might be in one person, and the equitable interest in another, by which means the court can order the trustee who had the legal interest to surrender, though *cestuique trust* refuses, but here the legal and equitable interest are both in *Richardson*. *Ex parte* BUTLER.

But to the end justice might be done to the creditors, he recommended it to the lord mayor and aldermen, upon *Richardson*'s non-attendance by which his office was forfeited and vacated, to dismiss him, and to admit *Buck* in his room, upon payment of the 850 *l.* and the alienation fine to the chamber of *London*.

(Gg) *What shall or shall not be said to be a Bankrupt's Estate.*

Brown, Assignee of *Roger Williams* a Bankrupt, v. *Heathcote* and *Martyn*. *October* the 27th, 1746.

Vide under the Division, The Construction of the Statute of 21 Jac. 1. cap. 19. *with respect to Bankrupt's Possession of Goods after Assignment.*

Ex parte Richard Flyn and Richard Field Merchants. *December* the 23d, 1748.

Vide under the same Division.

(Hh) *Where there is a Trust for a Bankrupt's Wife.*

Ex parte Elizabeth Greenaway. *December* the 23d, 1740.

Vide under the Division, Contingent Debts.

Ex parte Groome. *October* the 20th, 1744.

Vide under the same Division.

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Walker and others v. *Burrows*. *November* the 6th, 1745.

Vide under the Division, Where Assignees are liable to the same Equity with the Bankrupt.

Grey v. *Kentish*. *July* the 31st, 1749.

Vide title *Baron and Feme, under the Division, Rule as to a Possibility of the Wife.*

December the 23d, 1751.

Ex parte Elizabeth Michell.

Vide under the Division, Contingent Debts.

(Ii) *What is a trading to make a Man a Bankrupt.*

December the 21th, 1737.

Highmore v. *Molloy.*

Vide under the Division, Who are liable to Bankruptcy.

January the 22d, 1739.

Ex parte Carington.

Vide under the same Division.

December the 24th, 1747.

Ex parte Meymot.

Vide under the Division, What is or is not an act of Bankruptcy.

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February the 24th, 1752.

Richardson and *Gibbons*, Assignees of *Alexander Wilson*, a Bankrupt. —— } Plaintiffs.

Bradshaw, *Taylor*, and *Wilson*, —— Defendants.

Vide under the Division, Rule as to Drawers and Indorsors of Bills, &c.

January the 22d, 1752.

Case 119.

Bankers having taken upon them to act as *scriveners*, made it necessary for the legislature in the 5 *Geo.* 2. to add *bankers*, as being liable to commissions of bankruptcy.

A person acting as banker, will be considered as such, tho' he does not keep an open shop.

Ex parte Wilson, and *Ex parte* Bradshaw.

LORD *Chancellor*: The clause in 5 *Geo.* 2. relating to dealers as bankers, *&c.* took it's rise from that part of the 21 *Jac.* 1. relating to *Scriveners*, who were more numerous than in latter days; for bankers have taken upon them to act as *Scriveners*, and therefore made it necessary for the legislature to add *Bankers*, as being liable to commissions of bankruptcy.

Mr. *Wilson* being an agent to 26 regiments, will not make him a bankrupt, nor will it exempt him from being one.

It is said, he could be no banker because he kept no shop.

A *Scrivener* does not keep an open shop, and yet as he receives money belonging to other people, and places it out on securities, which is the business of a *Scrivener*, he may be a bankrupt.

So may a person acting as banker, though not keeping an open shop.

His keeping his cash with *Drummonds*, and paying, from 1739 to 1751, 30,000 *l.* a month, in all three millions, is insisted to be very strong, if not conclusive evidence, that he was no banker himself.

It

It is inconceivable that he could lodge such sums in another person's hands, and have no profit or allowance. *Ex parte* WILSON.

The great point is, That here is a doubt upon the evidence, and if the weight of evidence had been against the commission, yet the court will not supersede it, because a commission of bankruptcy is as much *ex debito justitiæ* as a writ, (1) and I know no instance where this court have superseded a commission, without directing an issue, unless it appears very plainly to be taken out fraudulently, or vexatiously.

A commission of bankruptcy is as much *ex debito justitiæ* as a writ, and no instance where the court supersedes it, without directing an issue, unless it appears to be taken out fraudulently or vexatiously.

Lord Chancellor directed the issue to be tried in the court of King's Bench in *Middlesex*.

(1) *Backwell's Case*, 2 *Cha. Ca.* 191. 1 *Vern.* 152. S. C.

(Kk) *Rule as to Acts of Parliament relating to Bankrupts.* [219]

Ex parte Burchell.

April the 2d, 1742.

Vide under the Division, The Construction of the Repealing Clause of the tenth of Queen Ann.

Ex parte Lingood.

May the 12th, 1742.

Vide under the Division, Rule as to a Certificate from Commissioners to a Judge.

Walker and others v. *Burrows*.

November the 6th, 1745.

Vide under the Division, Rule as to Assignees.

(Ll) *What is or is not an Election to abide under a Commission.*

Ex parte Capot.

April the 4th, 1739.

Case 120.

AFTER a commission of bankruptcy issued, and two dividends made in consequence, one of the assignees brought an action against the bankrupt, and laid him in execution for the residue of the debt, and upon application to the *Lord Chancellor*, three questions were made by his Lordship.

An assignee upon refunding what he had received under two dividends, allowed to make his election, to proceed at law against the bankrupt.

First, If the creditor was intitled to pursue the person of the bankrupt, and yet receive a proportionable benefit under the commission, which he said he thought was by no means to be done,

The old laws considered bankrupts as fraudulent insolvents, but the more modern, as unfortunate ones, and upon these statutes have the applications been made, to compel creditors who proceed in a double way, to make their election.

Ex parte CABOT.

done, as the law of bankrupts now ftands: The old laws confidered bankrupts as fraudulent infolvents, and they are often called offenders, (1) but the more modern laws have confidered them as unfortunate infolvents, and upon thefe ftatutes, thefe applications have been made to the court, which has obliged creditors who were proceeding in the double way, to make their election.

The next queftion was, If he was now at liberty to make his election, or whether he had not made his election by taking the dividends.

But upon refunding what he had received as dividends, his Lordfhip gave him leave to make his election.

The third queftion was, If he upon refunding, and electing to proceed againft the perfon, fhould have liberty to come in under the commiffion and prove his debt, fo as to diffent from, or affent to his certificate (2).

The reafon why fuch creditor who elects to proceed at law, fhall ftill be allowed to affent or diffent to the bankrupt's certificate, is to make the remedy againft the perfon effectual.

Lord Chancellor faid, feveral fuch orders were made by Lord *Talbot*, and accordingly fuch order was made in the prefent cafe, and he faid the reafon of the court for fuch order was, to make the remedy againft the perfon effectual; for otherwife the perfon may, by the reft of the creditors, be abfolutely difcharged from the remedy which this creditor has elected to take.

(1) *Ante Bromley* v. *Goodere*, 77.

(2) See the next cafes, *Ex parte Lindfey*, & *Ex parte Devilliers*, *Ex parte Ward*, *ante* 153.

December the 23d, 1743.

Ex parte Ward.

Vide under the Divifion, Rule as to a Petitioning Creditor.

October the 26th, 1745.

Ex parte Lindfey the Bankrupt.

Cafe 121.

See the preceding Cafe.

Notwithftanding a creditor under a commiffion of bankrupt elects to proceed at law, he may ftill affent or diffent to the certificate.

A Petition to be difcharged from a commitment at the fuit of one *Henkle*, who has proved a debt under the commiffion.

Lord Chancellor: The creditor muft either waive his proof under the commiffion, or make his election to proceed under it, but notwithftanding he elects to proceed at law, he may ftill affent or diffent to the certificate.

It not being clear, whether the debt under the commiffion is the fame for which the action was brought, his Lordfhip adjourned the petition for want of the proceedings under the commiffion which were miflaid.

Auguft the 7th, 1746.

Ex parte Lewes.

Vide under the Divifion, Rule as to a Petitioning Creditor.

Ex parte Dorvilliers.

August the 7th, 1751.

Case 122.

AN application by the petitioner the bankrupt, praying that *Moses Moravia*, who has brought an action against him, and also proved a debt of 800*l*. and upwards under the commission, may make his election to continue under the commission, or proceed at law.

See the two preceding cases.

Moravia alone, being the majority in value of the creditors, chose himself assignee.

Lord Chancellor was doubtful whether the circumstance of chusing himself is not making an election to proceed under the commission; but on his electing in court to proceed at law, his Lordship made an order that *Moravia* should be discharged as a creditor under the commission, but still allowed to assent or dissent to the bankrupt's certificate.

Though a person chuses himself assignee, he may elect to proceed at law, or under the commission.

(Mm) *Rule as to Prosecutions against Bankrupts for Felony in not surrendring himself.*

Ex parte Wood; in the Matter of *Comerlan* a Bankrupt.

August the 7th, 1751.

Case 123.

AN application to the court that the commissioners should admit him a creditor for 21*l*. upon a note of hand under this commission, and that the clerk of the commission may be ordered to attend at the *Old Bailey* with the proceedings under the commission, upon a prosecution, against the bankrupt for felony, in not surrendering himself according to the directions of the act of parliament of the 5th of *George* the Second.

The petitioner applies for an order upon the commissioners to admit him a creditor for 21*l*. upon note, and that the clerk of the commission may be ordered to attend at the *Old Bailey*, with the proceedings upon a prosecution against the bankrupt for felony, in not surrendring himself according to the directions of the act of parliament. As the petitioner has not yet proved his debt, if not made out to the satisfaction of the commissioners, it may be rejected; and though such a prosecution may be carried on by a person who is not a creditor, yet, by the words of the act of parliament, it looks as if the legislature intended there should be a concurrence of the creditors under the commission; and as this is a penal law, a court of equity will not lend its aid to such a prosecution, by ordering the clerk to attend with the proceedings at the *Old Bailey*, and therefore would not grant the petition.

The bankrupt is a foreigner, but lived several years in *England*, and went to *Holland* before the commission was taken out, and stayed there till the forty-two days were expired for his surrendring himself, and about six weeks after the time expired returned to *England*.

Lord Chancellor: Though such a prosecution may be carried on by a person who is not a creditor, yet by the words of the act of parliament it looks as if the legislature intended there should be a concurrence of the creditors under the commission.

In the present case the petitioner has not as yet proved any debt, and when he goes before the commissioners, if he does not

Ex parte Wood.

not make it out to the ſatisfaction of the commiſſioners, he may be rejected (1).

Affidavits have been read of the aſſignees and creditors, whoſe debts amounted to 1800*l.* and upwards, that they are very well ſatisfied with the account he has given them of the ſtate of his affairs, and that they believe he could not have made a fuller diſcovery or diſcloſure of his eſtate and effects, if he had appeared at the third ſitting of the commiſſioners at *Guild-hall*, which is the time appointed for the bankrupt's finiſhing his examination.

This is a penal law, and a ſevere one, for it reaches to the life of the bankrupt, and therefore a court of equity will not lend its aid to ſuch a proſecution, by ordering the clerk of the commiſſion to attend at the *Old Bailey* with the proceedings under the commiſſion, but the petitioner muſt go on in ſuch manner as the law preſcribes to prove him a bankrupt, and a felon within the intent and meaning of the act of parliament; and therefore would not grant that part of the petition, which relates to this intended proſecution of *Comerlan* the bankrupt.

Where a bankrupt did not ſurrender himſelf in due time, if there did not appear to be any intention of defrauding his creditors, Lord *Macclesfield*, in ſeveral inſtances, ſuperſeded the commiſſion, in order to prevent ſuch a proſecution.

Lord *Macclesfield* did in more inſtances than one ſuperſede a commiſſion of bankruptcy, where the bankrupt had not ſurrendered himſelf within the 42 days, if there did not appear to be any intention in the bankrupt of defrauding his creditors by not appearing within the time appointed, and where his abſence proceeded rather from an ignorance of the conſequence or accident; and his Lordſhip took this method to prevent a proſecution.

But there is no occaſion to do any thing of that ſort here, as it is not probable the petitioner will be able, upon the circumſtances of this caſe, to ſupport ſuch a proſecution (2).

(1) *Ex parte Simpſon*, *ante* 71. *Rep.* 47. *Ex parte Graham*, *ibid.* 48.
(2) See *Ex parte White*, 2 *Bro. Cha.*

(Nn) *Rule as to Contingent Creditors in reſpect to Dividends.*

October the 20th, 1744.

Ex parte Groom.

Vide under the Diviſion, Contingent Debts.

Ex parte Elizabeth Michell.

Vide under the ſame Diviſion.

(Oo) *Rule as to mutual Debts and Credits.*

January the 22d, 1741, and *March* the 31ſt, 1742.

Ex parte Henry Lanoy Hunter, Eſq. In the matter of *James Hunter* and *Loth Specht*, Bankrupts.

Caſe 124.

A. lends a ſum of money to one partner on his own ſecurity, he lends the ſame to the partnerſhip trade, a joint commiſſion is taken out. A. ſhall not come in as a creditor upon the joint eſtate of the bankrupts immediately and directly, with the reſt of the partnerſhip creditors, but by way of circuity he is intitled, as ſtanding in the place of that partner who has paid the money to the uſe of the partnerſhip trade.

MR. *James Hunter* and Mr. *Loth Specht* were partners in trade, and the terms of the articles were, that the ſtock ſhould conſiſt of 4500*l.* and that this ſum of money ſhould be put in by *Hunter* only, and that he ſhould be intitled to two-thirds of the profit of the trade, and *Specht* to the remaining one-third; but as to the principal ſum of 4500*l.* the articles provided that it ſhould belong wholly to *Hunter*. Under theſe reſtrictions the partners entered upon trade, and more money being wanted to carry it on, *James Hunter* applied to his brother Mr. *Lanoy Hunter*, the petitioner, who in the year 1733 advanced him, at three different times, upon his note of hand, the ſum of 1500*l.* at 4 *per cent.* and afterwards gave a bond for this money, in which he was ſingly bound; for Mr. *Specht* was not then privy to any part of the tranſaction, but agreed afterwards that *James Hunter* ſhould, in his own name, lend this ſum to the partnerſhip; and in the book intitled, *The private account of caſh*, the partnerſhip ſtock is made debtor to Mr. *James Hunter* for the 1500*l.* and intereſt for the loan of this money, at the rate of 4 *per cent.* to be allowed him out of the produce of the patrnerſhip trade.

Mr. *James Hunter* having in his poſſeſſion for ſafe cuſtody twenty-five *South-ſea* bonds, and eight *Eaſt-India* bonds, which were the petitioner's property, did, without his knowledge, upon the ſecurity of the ſeveral bonds, borrow of the bank of *England* in *November* 1735, 3000*l.* and afterwards lent that ſum too at the like intereſt to the partnerſhip trade, and made an entry in the ſame manner with the former made in the private caſh book.

Mr. *James Hunter* and Mr. *Specht* having become bankrupts in *July* laſt, a joint commiſſion of bankruptcy iſſued againſt them as partners, and they were declared bankrupts, and *Samuel Nicholſon* choſen aſſignee.

The petitioner applied to the commiſſioners to be admitted a creditor for the two ſums of 1500*l.* and 3000*l.* on the bankrupt's joint eſtate, who refuſed to admit him to prove the ſame; and thereſore prays that his Lordſhip would order that the petitioner ſhould be admitted a creditor upon the joint eſtate for the ſeveral demands; and in caſe the court ſhould not think fit to admit the petitioner a creditor for the ſeveral debts under the partnerſhip eſtate, that then he might be admitted a creditor for the ſame, upon the reſpective ſeparate eſtate of *James Hunter*.

To

Ex parte HUNTER.

To intitle the petitioner to come upon the joint estate, it was suggested that though the money was borrowed by one of the partners, and security given by him only; yet, as it came to the use of the partnership, that he ought to be admitted to come in as a creditor upon the partnership.

Lord Chancellor: My opinion is, that the petition ought to be dismissed, but without prejudice to the petitioner's bringing a bill, if he should think proper, to have the benefit of the same matter which he now insists on.

It has been contended on the part of the petition, that the money in question was jointly lent to the partners; but that is expressly contradicted by their own affidavits, for they admit particularly the 1500*l.* to be lent to *James Hunter* with an intention that he should apply the same for the benefit of the partnership; the consequence of this is, that here are plainly two contracts, one as between *Henry Lanoy Hunter* and *James Hunter*, the other as between *James* and his partner.

As this is the case, there is no ground for the petitioner's coming in as an immediate creditor for this money upon the partnership estate; but then it has been said that by a circuity the petitioner may have the same kind of relief; for if the money which was advanced by *Henry* to *James* was lent by *James* to the partnership estate, then, as *James* might have come in as a creditor for this sum upon that estate, the petitioner will be intitled to stand in the place of *James*, and to have the same remedy as he would have had.

But I do not know any determination of the court which has gone so far in a case of this nature. Mr. *Murray* has put this matter in another way; he says that there is no occasion for the petitioner to make use of a circuity in this case, but that he ought to be let in originally upon the partnership estate, because *Specht* had no interest in the capital, for by the articles, if *James* should happen to die during the life of *Specht*, the whole principal of the 4500*l.* was to go to the executor of *James*.

But it would be going too far to say, that any secret agreement which partners enter into between themselves, can hinder those that immediately trust the partnership estate from having their compleat satisfaction out of it.

The only method therefore wherein the petitioner can have his satisfaction out of the partnership estate, is by way of circuity by standing in the place of *James*.

Consider what great inconveniences would follow, in case this doctrine should prevail. In the first place, those that are plainly creditors upon the partnership estate, must be at liberty to controvert whether the fact is as stated by the articles, that the whole 4500*l.* was brought into the partnership estate by *Hunter* only; in the next place, supposing this was the fact, yet, in respect of strangers, the money must be considered as brought into the partnership estate by both (1).

(1) See *Craven* v. *Widdows*, 2 *Cha. Ca.* 139.

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For these reasons his Lordship said he would not determine this matter in favour of Mr. *Henry Lanoy Hunter*, upon a petition, but would have him to bring a bill for this purpose, if he should be so advised.

Upon which the Attorney General, who was counsel for the petitioner, said, that in *Lavington* v. *Paul*, before Lord *Talbot*, to the best of his remembrance it was determined that in cases of this nature the party might be allowed to have his satisfaction out of the partnership estate. The petition upon this was ordered to stand over to search for precedents. [225]

Upon the 31st of *March*, 1742, the petition came on again.

Where one partner takes out more money from the partnership stock than his share amounted to, the other has a right to come upon the separate estate of that partner *pro tanto*.

Mr. Attorney General, who was counsel for the petitioner, considered him as standing in the place of the bankrupt, and as the partnership was increased by the money lent by Mr. *James Hunter*, he saw no reason why one partner might not be a debtor to another, and in support of this argument he cited a case, *ex parte Drake, December the 20th*, 1735, *before Lord* Talbot, *where there were two partners, and one had taken out more money from the partnership stock than his share amounted to, and therefore became a debtor for so much; and my Lord* Talbot *was of opinion, that the partnership creditor had a right to come upon the separate estate of the partner who was so indebted* (1).

Two partners agree to borrow a sum of money, but one only gives a bond, and the other only a witness to it, the money afterwards entered in the cash book of the partnership, a joint commission taken out, obligee is intitled to be admitted a creditor.

Mr. *Murray* cited a case *ex parte Gilbert Brown, the 4th of* March, 1725. *There two partners agreed to borrow a sum of money for the use of the partnership, but one of them only gave a bond for securing the payment, and the other was a witness to it; this money was afterwards entered in the cash book of the partnership, a joint commission taken out against them, and the obligee denied by the commissioners to be admitted a creditor; but Lord* King *on his petition was of opinion that he ought to be admitted, and directed accordingly.*

So in the present case, the partnership being in want of money, one of the partners borrows it, and gives a separate bond indeed for it, but still the money came to the use of the partnership; then the question will be, whether the obligee shall be admitted to come in as a creditor upon the joint commission? But suppose your Lordship should be of opinion that the obligee cannot come in upon the joint estate, I would submit it to you that he can clearly come in as a creditor upon the separate estate of *James Hunter*, , for if there had been no bankruptcy the partners could not have made a dividend of the joint stock, till this money, which *James Hunter* lent to the partnership, had been first taken out of it.

Joint creditors have no right to any thing but what is properly the joint estate, and if this money had not been lent, the partnership fund would have been 4500*l.* less than it is now; and it would be an extreme hard case, where there has been such a large increase of the fund by the means of a third person, if he should not be allowed to come in as a creditor. The rules established in this court in relation to bankruptcies are not founded upon the acts of parliament, merely, but upon equitable

(1) *Vide Ex parte Batson, Ves. Jun.* 226. 2 Cha. Ca. 139. 166. *Craven* v. *Knight*, 2 Cha. Rep.

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constructions; and to lay it down for a rule, that nothing shall intitle a person to come in as a creditor upon the joint estate, but where partners are jointly bound, notwithstanding the money has been applied to the use of the partnership, is not a very equitable one.

[226] Mr. *Brown e contra.*

There is no foundation for the petitioner to be admitted a creditor on the partnership account, as this is a dispute between two sets of contending creditors.

No doubt but payment of money may raise a consideration, and make it a debt, and so *vice versa* it may not raise a consideration; but it is pretended that at that time this money was advanced, Mr. *Henry Lancy Hunter* knew the partnership would be liable to answer it to him; it appears from his own evidence that he lent it merely upon the credit of his brother Mr. *James Hunter*, and if it should extend further, it would be attended with great inconveniencies.

The open and publick books do not mention it as a loan; it is only a private cash account, which they might have sunk if they pleased, as it was intended for their private use only. Now creditors would never be safe, if near relations of bankrupts, as in this case, may set up a demand or not against the partnership, just as the event turns out, *viz.* whether the separate estate or the joint estate of the obligees will answer best. Could Mr. *Lancy Hunter*, who lent this money, have brought an action against Mr. *Specht* the other partner? I apprehend clearly he could not.

The next consideration is, whether the petitioner has any right to stand in the place of *James Hunter*, and by that means be intitled to recover this money before the joint stock is divided?

I will not dispute the petitioner's right, if the bankrupt had any, and therefore consider it merely as the bankrupt's case, and supposing there were no separate creditors, then the whole fund in the first place must go to satisfy the partnership creditors; and the bankrupt, if there is any surplus, is intitled to that only.

Lord Chancellor: 1st, question, Whether the petitioner is intitled to come in as a creditor, upon the joint estate of the bankrupts immediately, and directly with the rest of the partnership creditors?

2d, question. Supposing he is not immediately and directly intitled, whether he is not intitled to come in by a circuity, which this court allows, as standing in the place of *James Hunter*, who has paid the money to the use of the partnership trade?

The first question ought to be considered in the first place, because if the petitioner is immediately intitled, then there is no occasion to have recourse to the circuity.

But I am of opinion that he is not immediately and directly intitled, and the evidence upon his own affidavits rather than against him, for a man must be a creditor by force of some contract, either express or implied: as where goods are delivered, though no express contract, the law implies one, and an *assumpsit* will

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will lie; but according to the account Mr. *Specht*, the other partner, gives of this transaction, Mr. *Lanoy Hunter* had neither an express nor implied contract with the partnership.

Mr. *Specht* agreeing that *James Hunter* should, in his own name, lend this money to the partnership, explains in what manner *Specht* meant to borrow money for the use of the partnership, and does by no means prove that he intended the partnership fund should be a security to the petitioner.

It is very true there might have been a loan to the partnership, notwithstanding the notes were given by one of them only, and if the contract had been originally between the petitioner and both the partners, though the bond is executed by one only, yet it would be considered as a collateral security, and both of them would have been liable notwithstanding.

Upon the whole of the question *James Hunter* only appears to have lent the 1500*l.* to the partnership, and the petitioner does not seem so much as to have it in his thoughts.

As to the 3000*l.* borrowed of the bank upon the security of the *South-sea* stock, and *East-India* bonds, which were the property of the petitioner; Mr. *James Hunter*, by a misapplication and abuse of his trust, has procured this money, and lent it upon the same terms, and in the same manner, as he did the 1500*l.* to the partnership trade, as appears by the private cash account.

Now in that book, *James Hunter* is made debtor on one side, and *per contra* creditor, and therefore I cannot call it the account of any other person.

So that upon the first point, I am clearly of opinion, that the petitioner cannot be directly and immediately intitled.

As to the second question, his coming in by way of circuity, I own formerly I was very doubtful, but now I am of opinion, that Mr. *Henry Lanoy Hunter* is this way intitled.

The principal obscurity in this case has arisen from his counsel's insisting, that the petitioner ought to stand in the place of *James Hunter*, who is one of the bankrupts; for by this means they have confined it merely to the several lights in which he stands.

Now it is certain, *James Hunter* himself can have no satisfaction but out of the surplus which shall remain after the joint creditors are paid; but as between different sorts of creditors, it is otherwise.

The truth of the thing is this, *Henry Lanoy Hunter* being a separate creditor to *James Hunter*, is intitled to have his satisfaction out of every thing which can be considered as the separate estate of *James*, and therefore the rules which the court go by, with regard to the distribution of bankrupts' effects, will be a material consideration in this case.

Joint creditors, where there are no separate, may exhaust both the joint and separate estate, till their debts are paid, and the bankrupt will not be intitled to a shilling till the joint cre-

Joint creditors, where there are no separate, may exhaust both the joint and separate estate, but where there are both joint and separate creditors, the joint estate shall be applied to the satisfaction of the joint, and the separate estate, to the satisfaction of the separate creditors.

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ditors are fully satisfied; but where there are separate as well as joint creditors, tho' as I said before, in the case of the bankrupts, the separate estate shall be equally applied; yet as between joint and separate creditors it is otherwise, for the joint estate shall be applied to the satisfaction of the joint, and the separate estate to the satisfaction of the separate creditors.

Suppose a joint commission against two partners, and a separate commission likewise, and the assignees under the joint, possess themselves of any specifick part, the bankrupts themselves could not take away this specifick part, tho' they had a distinct and a joint property in it, yet it is every day's experience, that the assignees under the separate commission may do it, upon application to this court.

Suppose these partners had never become bankrupt to the end of the partnership, and they had settled accounts, must not the demand Mr. *James Hunter* had upon the partnership be taken out, before a division could be made of it.

If there be a surplus of the separate estate, the joint creditors are intitled to it, for a bankrupt has no right to any thing till they are fully satisfied.

This shews clearly, that Mr. *James Hunter* was a creditor upon the joint stock, then it follows that the creditors of his separate estate have a right to this in the first place (1); indeed if there should be any surplus of the separate estate, after this money is paid, the joint creditors will be intitled to it.

And this determination is according to the rule of the court, in regard to the distribution of bankrupts' effects upon a view of the different rights of creditors.

(1) *Sed vide ex parte Burrell*, 1 Cooke's B. Laws 556. *Ex parte Pine*, *ibid.*

November 4th, 1748.

Bromely and Others, Creditors of Sir *Stephen Evance*, — — Plaintiffs.

Goodere, surviving Assignee of Sir *Stephen Evance*, and Others, — — Defendants.

Vide under the Division, Rule as to the Certificate of a Bankrupt.

October 20th, 1744.

Ex parte Groome.

Vide under the Division, Contingent Debts.

June 8th, 1748.

Ex parte Deeze.

Case 125. [illegible] packer may [illegible]ain goods till he is paid the price of packing, and if he has another debt due to h[illegible]m the s[illegible] person, the [illegible] shall not [illegible]n from him till he has paid the whole, notwithstanding the debtor is become a bankrupt.

MR. *Norton Nicholls*, a merchant, borrowed of the petitioner the sum of 500 *l.* for which he gave a note of hand, afterwards he sent the petitioner, who was a packer, six bales of cloth to pack and press; some time after *Nicholls* paid off a part of the 500*l.* and interest for the remainder, and then asked the petitioner if he would have the whole paid off, which the petitioner declined, and then the old note was delivered up,

and

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and a new one given for the remainder: before the remainder was paid, and before the six bales were taken out of the petitioner's custody, *Nicholls* became a bankrupt, and it was agreed between the petitioner, and the assignees of *Nicholls* under the commission, that it should be determined in a summary way, upon a petition to *Lord Chancellor*, whether the petitioner could retain the six bales till his whole debt was satisfied. [229]

N. B. There were no goods in the hands of the petitioner, when he first lent the money, nor had there been dealings between them for many years.

It also appeared there was, at the time of the bankruptcy, 19 *l.* due to *Deeze* for the packing and pressing these bales, and there was due from *Deeze* to *Nicholls* near that sum for wine.

Lord Chancellor: I am of opinion that under the circumstances of the present case, the assignees have not a right to take those goods from the petitioner, without making him a satisfaction for his whole debt.

Notwithstanding the rules of law as to bankrupts reduce all creditors to an equality, yet it is hard where a man has a debt due from a bankrupt, and has at the same time goods of a bankrupt in his hands, which cannot be got from him without the assistance of law or equity, that the assignees should take them from him without satisfying the whole debt.

There have been many cases to which the clause in the act of parliament relating to mutual credit has been extended, where neither an action of account would lie, nor could this court decree one.

And therefore the clause in the act of parliament of the 5 *Geo.* 2. relating to mutual credit, has received a very liberal construction, and there have been many cases which that clause has been extended to where an action of account would not lie, nor could this court upon a bill decree an account.

The question then will be, whether there is any specifick lien on those goods in the petitioner's hands, either by express contract, or from the nature of the dealing; if not, whether there is any mutual credit and account.

To be sure packers may retain goods till they are paid the price and labour of packing, and so other trades may retain in the like manner, therefore these goods were in the petitioner's hands in the nature of a pledge for some part of his debt, that is, the price of the packing; and what right has a court of equity to say, that if he has another debt due to him from the same person, that the goods shall be taken from him without having the whole paid?

In the case of *Demainbray* v. *Metcalfe*, before Lord *Cowper*, 2 *Vern*. 691. he said, he looked upon it as an account current between the pawner and pawnee; the present case I think is stronger, for here the goods are undoubtedly a pledge in the petitioner's hands for part of his debt.

Mutual credit is not confined to pecuniary demands only, but if a man has goods in his hands belonging to a debtor, it shall be considered as such (1).

It is very hard to say mutual credit should be confined to pecuniary demands, and that if a man has goods in his hands, belonging to a debtor of his, which cannot be got from him

(1) See *French* v. *Fenn*, 1 Cooke's B. Laws, 577. *Smith* v. *Hodgson*, 4 Durn. and East 211.

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without an action at law, or bill in equity, that it should not be considered as mutual credit; and Lord *Cowper*'s opinion plainly favours that construction, for he looked upon the jewels pawned, and notes given, as an account current between them.

[230] And here, though if there had been no bankruptcy, in an action for these goods, the debt could not have been set off, yet as the clause of mutual credit has been extended, I think it may come within that rule, especially as here is an account between them, on the one side 19*l.* due for packing, &c. on the other side much about the same sum due to the bankrupt's estate for wine (1).

(1) This case seems to have been determined upon evidence, that it was usual for packers to lend money to clothiers, and the cloths to be a pledge not only for the work done in packing, but for the loan of money likewise, (post. 237. 4 Burr. 2217.); according to which usage the *packer* was in the nature of a *factor*, and as such intitled to a *lien* upon the goods not only for incidental charges, but as an item of *mutual account* for the general balance due to him. *Ex parte Dumas*, post. 234. note 1. *Kratzer* v. *Wilcox*, and *Gardiner* v. *Coleman*, 1 Burr. 494. *Green* v. *Farmer*, 4 Burr. 2222. But *secus* where goods are delivered to a tradesman or manufacturer for a *particular purpose*, as corn to a miller to be ground, or cloth to be dyed by a dyer, &c.; for these have only a *specific lien* upon the goods for the price of grinding, dying, &c. *Ex parte Ockenden*, post. 235. *Green* v. *Farmer*, 4 Burr. 2214. 1 Black. Rep. 651. S. C. See also *ex parte Andrews*, 1 Cooke's B. Laws, 456.

November 25th, 1749.

Billon v. *Hide.*

Vide under the Division, Rule as to Drawers and Indorsers of Bills of Exchange.

August 16th, 1753.

Ex parte Charles Prescot: In the Matter of *Prescot* a Bankrupt, and Brother to the Petitioner.

Case 126.

The petitioner a creditor of the bankrupt for 100*l.* and 10*l.* and a debtor to him upon bond for 340*l.* payable on the 4th of *March*, 1756, with lawful interest; applies that he may set off his demand of 110*l.* against the principal and interest due on the bond as far as it will go, and not be obliged to prove his debt under the commission, and take a dividend upon it only. Though this is not in strictness a mutual debt, yet it is a mutual credit, for the bankrupt gives a credit to the petitioner in consideration of the bond, though payable at a future day; and he gives the credit for the debt the bankrupt owes him upon simple contract, and therefore within the equity of the 5 *Geo.* 2. An account directed to be taken between the petitioner and the bankrupt, and the balance only to be paid to the assignees.

THE petitioner a creditor for two debts, one of 100*l.* and the other of 10*l.* and at the same time a debtor upon bond given to the bankrupt for 340*l.* payable on the 4th of *March* 1756, with lawful interest, applies to the court, that he may be at liberty to set off his demand of 110*l.* as far as it will go against the interest and principal due on the bond, and not be obliged to prove his debt under the commission, and take a dividend only upon it.

Lord Chancellor: No case has been cited to me, either on one side or the other, and therefore I must make a precedent, and determine it on the rules of equity.

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The time of payment on the bond is not yet come, and therefore the condition of it not broken, as there is no debt that can be recovered upon it till the 4th of *March* 1756.

The petitioner insists he is not to be compelled to come in as other creditors to prove the debt of 110 *l.* as he pays interest now upon the bond, and in 1756 must pay the principal, but that he has a right to set off, and therefore prays the 110 *l.* may be deducted out of the principal and interest of the bond, and founds this right on the clause in the 5 *Geo.* 2. relating to mutual credit.

The words of that clause are, "That where it shall appear to "the commissioners, that there hath been mutual credit given "by the bankrupt, and any other person, or mutual debts be-"tween the bankrupt and any other person, at any time before "such person became a bankrupt, the commissioners, or the as-"signees of such bankrupt's estate, shall state the account be-"tween them, and one debt may be set against another; and "what shall appear to be due on either side, on the balance of "such account, and on setting such debts against one an-"other, and no more, shall be claimed or paid on either side "respectively." [231]

It has been objected by the counsel against the petitioner, that this is not a case of mutual debts, because the act means debts actually due; and here one debt is due, and the other not due, and therefore they are not properly mutual debts.

Before the making of this act, if a person was a creditor, he was obliged to prove his debt under the commission, and receive perhaps a dividend only of 2 *s.* 6 *d.* in the pound from the bankrupt's estate, and at the same time pay the whole to the assignee of what he owed to the bankrupt; to remedy this very great inconvenience and hardship, the act was made.

It is very true, as Mr. *Clarke* says, that the 5th of *Geo.* 2. being a posterior act, must be construed with a reference to the 7th of *Geo.* 1. *cap.* 31. and both acts considered together.

Taking it upon this foundation, what will be the result?

Suppose for instance there had been a bond from the bankrupt to *A.* payable at a future day, and a debt owing from *A.* on simple contract to the bankrupt for a less sum, the account between *A.* and the bankrupt shall first of all be stated, and one debt set against the other, and *A.* shall be intitled to a proportionable dividend of such bankrupt's estate, *pro rata* with the other creditors, "discounting the bond payable at a future time, "after the rate of 5 *per cent.* for what he shall so receive, to be "computed from the actual payment thereof, to the time such "debt should or would have become payable in and by such "bond." These are the words at the conclusion of the clause in the statute of the 7th of *Geo.* 1. relating to creditors whose debts are payable at a future day.

Consider it then the other way, where *A.* is a debtor to the bankrupt by bond payable at a future day, and a creditor upon his estate by simple contract for a less sum, would it be just and equitable that he should be obliged to prove his debt under the

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commiſſion, and receive perhaps 1 *s.* only in the pound, and yet when his bond becomes due, which in ſome inſtances might be in three months only, pay the whole debt, principal and intereſt, to the aſſignee under the commiſſion?

This may indeed in ſtrictneſs be ſaid not to be a mutual debt, but is it not a mutual credit?

The bankrupt gives a credit to the petitioner in conſideration of this bond, though payable at a future day; and the petitioner gives the bankrupt credit for the debt he owes the petitioner upon ſimple contract; and therefore I think this caſe is within the equity of the 5th of *Geo.* 2.

Therefore upon the petitioner's agreeing to pay the balance forthwith to the aſſignees, which the act of parliament requires, let it be referred to the commiſſioners to take the account between him and the bankrupt, and let what ſhall be found due [232] from the bankrupt, at the time of the bankruptcy, be deducted out of what ſhall be due on the petitioner's bond for principal and intereſt, and the balance only be paid by the petitioner to he aſſignees.

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Auguſt the 9th, 1754

Ex parte Dumas; in the Matter of *Peter Bartholomew Jullian*, a Bankrupt.

Caſe 127.

S. C. 2 Vez. 582. pl. 20. 6.

THE petitioners, who were merchants and co-partners at *Paris*, had dealings with *John Jullian* the father, and the bankrupt his ſon, who were merchants in *London*, and co-partners.

Dumas and others, the petitioners, drew bills of exchange on *Jullian* and ſon for 1115 *l.* and undertook to make remittances to pay the ſame, and at the ſame time acquainted them that theſe bills were for the proper account of the petitioner's houſe at *Cadiz*, and deſired the *Jullians* would keep a diſtinct account, and diſtinguiſh ſuch new account by the letter *G.* being the initial letter of the firſt partner's name at *Cadiz*. Bills drawn on *Vanneck* and Company in *London* to the amount of 1146 *s.* 11 *s.* 11 *d.* remitted accordingly. The *Jullians* by letter acknowledge the receipt thereof, and promiſe the petitioners to give credit in the account *G.* *Jullian* the father died the 25th of *February* laſt. The day before the ſon ſtopped payment, he got two of theſe remittances diſcounted for 566 *l.* 11 *s.* 11 *d.* On the 20th of *March* a commiſſion of bankruptcy iſſued againſt *Jullian* the ſon. The application was, that the aſſignees may be directed to deliver to petitioners the ſeveral bills of 1146 *l.* 11 *s.* 11 *d.* or pay the full value.

Lord Chancellor of opinion the ſpecifick bills amounting to 580 *l.* ought to be delivered by the aſſignees of *Jullian* to the petitioners. As to thoſe which were diſcounted, the petitioners waived their claim.

The petitioners drew ſeveral bills of exchange in *December* laſt on *Jullian* and his ſon, amounting to 1115 *l.* and undertook to make remittances in order to pay the ſaid bills, and at the ſame time acquainted them that theſe bills were intended for the proper and particular account of the petitioner's houſe at *Cadiz*, and deſired them to open a new account for theſe bills in their books, and to keep the ſame ſeparate and diſtinct from their own, and to diſtinguiſh ſuch new account by the mark or letter *G.* being the initial letter of the name of the firſt of the partners, who have the management or direction of the houſe at *Cadiz*.

The petitioners did accordingly remit to *Jullian* and his ſon ſeveral bills drawn on *Venneck* and Company, and on the other merchants

merchants in *London*, amounting in the whole to the sum of 1146*l.* 11*s.* 11*d.* *Ex parte* DUMAS.

Jullian the father and his son, in a letter to the petitioners, acknowledge the receipt of the several bills, and expresly promise to give the petitioners credit in their new account *G.*

On the 25th of *February* last *Jullian* the father died.

On the 27th of *February*, the very day the creditors of the *Jullians'* met, a resolution had been taken by *Peter* the son to stop payment, and which he did accordingly. The next day he ventured to get two of these remittances discounted, one for 300*l.* and another for 266*l.* 11*s.* 11*d.* making together 566*l.* 11*s.* 11*d.*

On the 20th of *March* a commission of bankruptcy was awarded, and issued against *Peter Jullian*; and *James Godin* and *Francis Duval* of *London*, merchants, were chosen assignees.

The petitioners insist the said bills were not liable to be applied or converted by *John Jullian* and his son to any other use, or on any other account, than as the petitioners had directed and charged; that the several bills now remain in the hands of the assignees, or if the bills or any part have been applied to any other use, such proceeding was not only a gross fraud, but absolutely illegal. [233]

They pray therefore that the assignees may be ordered to deliver to the petitioners the several bills, amounting together to the sum of 1146*l.* 11*s.* 11*d.* and in case it shall appear, that any of the bills have been received either by the said *Jullian* and his son before the father's death, or by *Peter* the son since his father's death, or by the assignees since *Peter*'s bankruptcy, that in such case the assignees may pay to the petitioners the full value of such bills.

The counsel for the petitioners insisted the bills ought to be appropriated to the particular purpose mentioned in the letter of the petitioners to the *Jullians*, and that while the bills are in being, they belong to the petitioners, and they have a specifick lien upon them wherever they are; but as to those which were discounted, as money has no ear mark, they waived their claim in that respect.

The counsel for the assignees relied on the bankrupt's affidavit, in which he denied that *Dumas* and Company did acquaint him or his father, by any letter whatsoever, that these bills were intended for the proper and peculiar account of *Dumas* and Company's house at *Cadiz*, and insisted that all bills are considered as cash, and that merchants have credit for them as such, and that the usual and common course of trade and business amongst merchants is, that whenever they receive any bills from their correspondents abroad, the same are blended with their general stock, so as to answer their daily payments, and that it appears by the bankrupt's affidavit, that he and his father frequently paid several sums to the order of one correspondent in bills, or in money received for the discount of bills of other correspondents; and therefore these bills ought to be considered as the general credit of the *Jullians*, and must be brought into the general account.

 N. B.

Ex parte DUMAS.

N. B. The bankrupt admitted the receipt of the several bills, and that the petitioners by the letter that inclosed such bills desired they might be carried to a new account to be intitled *G.* and that since his father's death he did open such account *G.* and placed the same thereto accordingly.

Lord Chancellor: The present is a very plain case to give the petitioners a title to those bills which remain in specie unnegotiated.

It has been truly said this is a question of great consequence to the trade of the city of *London*; but then it is of a much greater weight in another respect, that the property of one man may not be dissipated to answer the debts of other men.

The rule of equality under commissions of bankruptcy extends only to his own estate, and not to matters which are not relative to his estate in law or equity.

The principal view I do admit under all commissions of bankrupts is, to put creditors as near as may be on a level, but that must be done only with regard to the bankrupt's own estate, for *if the matters in question are not relative to his estate in law or equity, especially in equity, the court will be of opinion that the persons who have either the legal interest in any thing, or a chose in action, which is an equitable interest, shall be intitled to it, and assignees in these cases must stand exactly in the same situation with the bankrupt himself, or otherwise commissions of bankruptcy would be an intolerable grievance.

[*234]

Where goods consigned to a factor continue in specie, and found in his hands at the time of his bankruptcy, the principal is intitled to them, and not the creditors at large.

Suppose the petitioners had consigned over goods to *Jullian* as their factor, and he had sold them, and turned them into money, the principal then could only have come in as a general creditor under the commission; but if the goods had continued in specie, and had been found in *Jullian*'s hands at the time of his bankruptcy, it would have been otherwise, and has been so determined in several cases; and even contrary to the express words of the statute of the 21 *Jac.* 1. factors have been excepted out of it for the sake of trade and merchandize (1).

Where goods so consigned are sold, and the factors took notes instead of money, the principal intitled to the notes.

The court of Common Pleas in a case, the name of which I do not remember, determined that notwithstanding the goods so consigned were sold, yet as the factor took notes instead of money for them, that the principal was intitled to the notes, and not the creditors at large.

The letter *G.* appears to be the initial letter of the first partner's name at the house at *Cadiz*.

These bills I consider as appropriated to a particular purpose (2), and intended to answer and reimburse the *Jullians* what they should pay on this special account, for by being indorsed they could negotiate and discount them; 580*l.* appears to be the amount of the bills left in specie.

Upon all these circumstances it would be the hardest thing in the world to say these bills should go to the creditors at large,

(1) *Vide Godfrey* v. *Furzo*, 3 P. W. 186. *Ryall* v. *Rolle*, ante 174. *Mace* v. *Cadell*, Cowp. 233. *Kruitzer* v. *Wilcox*, and *Gardiner* v. *Colman*, 1 Burr. 494. *Ex parte Deeze*, ante 228. note.

(2) *Secus* if the bills are sent on a *general* account between the correspondent and merchant, *Ex parte Fleurnois*, cited Ambler 297.

and

and therefore on the whole I am clearly of opinion that the specifick bills, amounting to 580*l.* must be delivered up by the assignees of *Jullian* to the petitioners *Dumas* and Company, or to such persons as they impower to receive them, and order accordingly (1). *Ex parte* DUMAS.

(1) *Ex party Emery*, 2 Vef 674. *Ex parte Ourfel*, Amb. 297. *D'Aquila* v. *Lambert*, 1 Cooke's B. Laws, 420. *Ex parte Chase*, *ibid.* 422.

Ex parte Shank and Others. *August* the 10th, 1754.

Case 128. A person who repairs a ship has no specifick lien, if delivered to the bankrupt; if repaired in a foreign port, while out upon a voyage, it would have been otherwise.

A Person who had repaired a ship belonging to a bankrupt insisted he had a specifick lien on the ship for the repairs, and was not obliged to prove it as a debt under the commission.

It appeared after the ship had been so repaired, the workman delivered it to the bankrupt who employed him, and therefore Lord Chancellor was of opinion he had no pretence, under the general law of the realm, to retain till he is paid, because it is out of his possession; and though the law of *Holland* gives a person who repairs a house or ship a specifick lien, there is no such law in *England*, and consequently he must account to the assignees for 101*l.* the money arising from the sale of this ship, which is admitted to be in his hands, and must come under the commission for the debt due to him for repairs, and ordered accordingly (1). [235]

If the ship had been repaired in a foreign port, while out upon a voyage, it would have been otherwise; but being repaired at home, it falls exactly within the case of *Stevens* v. *Sele*, before Lord *Talbot*. *Vide* this case stated in the cause of *Ryall* and *Rolle*, *Jan.* 27, 1749. (*a*) (2). (*a*) Ante 161.

(1) See *Justin* v. *Ballam*, 1 Salk 34. *Lister* v. *Baxter*, 1 Stra. 695 *Wilkinson* v. *Barnardiston*, 2 P. Wms. 307. *Buxton* v. *Snee*, 1 Vez. 154. *Wilkins* v. *Carmichael*, Doug. 97. *Rich* v. *Coe*, Cowp. 636. *Ex*[illegible] v. *D*[illegible]. 1 Durn. and East [illegible].

(2) *Lister* v. *Baxter*, 1 Stra. 695. *Wilkinson* v. *Barnardiston*. 2 P. W 367. *Sampson* v. *Burgington*, 1 Vez 443.

Ex parte Ockenden; in the Matter of *Robert Mathews*, a Bankrupt. *August* the 12th, 1754.

Case 129.

THIS petition came on upon the *Saturday* before, and was adjourned till to day for further consideration.

Robert Mathews, a flour factor in 1752, employed the petitioner as his miller, who had considerable dealings with *Mathews* in grinding of corn for him, on which account he was generally

In *March* last a commission of bankruptcy issued against *Mathews*, at the time he became a bankrupt indebted to the petitioner in 286*l.* 7*s.* 10*d.* for grinding of corn, and he had in his custody 36 loads and 3 bushels of wheat belonging to the bankrupt, part ground and part grinding, besides a great number of sacks. 16*l.* 5*s.* was due to the petitioner for grinding the corn which was in his hands at the time *Mathews* became a bankrupt. The wheat sold by the assignees, by agreement between them and petitioner, without prejudice to his claim, he now applies to be paid his whole debt out of the money arising by the sale. *Lord Chancellor* of opinion the petitioner had no specifick lien upon the corn and sacks, but only pro tanto as is due for grinding the corn in his hands See *Black. Rep.* 653.

Ex parte Ockenden. generally indebted to the petitioner in a large sum of money, who always had in his hands corn, meal, and sacks of *Mathews*, sometimes more, sometimes less, but for the most part sufficient to answer the sum due to the petitioner; and for this reason the petitioner gave *Mathews* a much greater credit than he would otherwise have done, as he always apprehended the corn, meal, and sacks, which he had in his hands, to be a security for the debt due from *Mathews*.

In *March* last a commission of bankruptcy issued against *Mathews*, and being declared a bankrupt, *Stephen Wear*, and three other persons, were chosen assignees.

At the time *Mathews* became a bankrupt, he was indebted to the petitioner in 286*l.* 7*s.* 10*d.* for the grinding of corn, for which he gave two promissory notes of 100*l.* each, and which became due before the bankruptcy, and the petitioner at the same time had in his custody 36 loads and 3 bushels of wheat belonging to the bankrupt, which was sent to be ground, part whereof was then ground into flour, and the remainder was then grinding, besides a very great number of sacks, and which the petitioner depended upon having as a security for his debt.

There was likewise due to the petitioner 16*l.* 5*s.* for grinding of corn, which was in his hands at the time *Mathews* became bankrupt, making in the whole 302*l.* 12*s.* 10*d.*

The petitioner applied to the assignees to redeem the corn, &c. and pay him the 302*l.* 12*s.* 10*d.* which they refused, but corn being a perishable commodity, and an immediate necessity of selling upon that account; the petitioner had delivered all [236] the wheat and sacks to the assignees to be sold without prejudice to his demand of his whole debt, or to the assignees' property in the goods, who have agreed, in case it shall be determined that the wheat, &c. was a security to the petitioner for his debt, to pay the whole.

Therefore the petitioner prays, that out of the money arising by the sale of the corn, &c. he may be paid his whole debt of 302*l.* 12*s.* 10*d.*

Lord Chancellor: In determining of this case, I am equally afraid of altering the consequences and effects of the course of dealings in trade, or of overturning the general rule in the course of bankruptcies.

It lies upon the petitioner to shew he has any lien upon the corn, &c. in his hands; and as to the specifick lien which he claims, I do not see there is a sufficient reason to consider it as such.

In this case no evidence has been produced of any contract, that the debt which was owing to the petitioner should be a lien on the corn, &c.

Nor is there any evidence, that there is any general custom with respect to millers that it should be a lien.

There is then no specifick lien, but what arises from that kind of bailment at law, proceeding from a delivery of goods for a particular purpose, as in the case of a horse standing in the stable

ftable of an inn-keeper, or cloth in the hands of a taylor, who have each of them a special property. *Ex parte* OCKENDEN.

Might not *Mathews* in this case before his bankruptcy have made a tender of what was due for grinding the corn, and if Mr. *Ockenden* the petitioner had refused to deliver the corn, *&c.* could not *Mathews* have brought an action of trover for it, and in that case would the defendant have been allowed to have pleaded a lien for any other debt, than what was actually due for grinding corn?

The case of *Demainbray* v. *Metcalfe*, *Prec. in Chan.* 419. was a sum borrowed first on the pawn of jewels, and afterwards three more several sums borrowed, for each of which the pawner gave his note, without taking notice of the jewels; it was determined that the executors of the borrower should not redeem the jewels, without paying the money due on the notes: there it must have been presumed the ground and foundation of the pawnee's lending the money, was his having a pledge in his hands, and there is no pretence to say, it would have been a lien, if the money had been lent before the delivery of the goods, and it therefore turned upon it's being a subsequent transaction.

Where *A.* borrows a sum of money on the pawn of jewels, and further sums afterwards upon his note: the executor of *A.* shall not redeem the jewels, without paying the money due on the notes.

The case of [illegible] v. *Mathews* and others, *Prec. in Chan.* 58[illegible]. appears to be a transaction between a clothier and a dyer, and there was evidence that they always made up their accounts by giving mutual credit, the dyer on one hand for work done, and on the other hand, the clothier for his cloth.

The case between clothiers and dyers, and [illegible] and [illegible] [illegible] from the [illegible], it being always customary for them to make up their accounts by giving mutual credits; the dyer for instance, on one hand for work done, and the clothier for his cloth.

In the petition *ex parte Deeze* (a) the 8th of *June* 1748, before me there was evidence, that it is usual for packers to lend money to clothiers, and the cloths to be a pledge not only for the work done in packing, but for the loan of money likewise (1). (a) *Ante* 228. [237]

Then it must come to the question upon the clause in the act of parliament relating to mutual credit; and I own I am extremely doubtful as to that.

Here is a quantity of corn delivered from time to time by a meal-man or corn-factor, to a miller the petitioner.

The law gives a particular lien *pro tanto*, as is due to the miller for grinding the corn, and no contract appears in this case to extend it further, and I must presume therefore it was not intended to be carried further.

The clause in the act of the 5 *Geo.* 2. relating to mutual credit, has been carried to be sure further, and rightfully, than a mere matter of account, but I do not know that a court of equity has gone further than the courts of law in the cases of a set-off (2).

Courts of equity gone further than courts of law, in the cases of a set-off, upon the act relating to mutual credit.

These cases go further indeed than cases of account; but can any case be put, where in the present instance there could have been a set-off.

(1) See 4 *Burr.* 2217. (2) *Ante* 126. *Bilton* v. *Hale*.

Suppose

Ex parte OCKENDEN.

Suppose the corn-factor had tendred the money for grinding the corn, and Mr. *Ockenden* the petitioner had refused to deliver it, and the bankrupt had thereupon brought an action of trover, could *Ockenden* have set off an antecedent debt? I am clearly of opinion he could not, and would have had only an allowance *pro tanto*, as was due for grinding the corn.

Suppose *vice versâ* an action had been brought by *Ockenden* against the bankrupt on account of the debt due for money lent to *Matthews*, could the bankrupt have set-off the value of the corn in the hands of *Ockenden*? I think clearly not.

These are my grounds, and I confess I am very apprehensive of breaking in upon the common course of dealing, and the rule of proceeding in commissions of bankruptcy.

Adjourned at the request of the petitioner's counsel, to the next day of petitions, being an affair of great consequence to trade and creditors in general (1).

(1) So *Green* v. *Farmer*, 4 *Burr.* 2214. *Deeze*, *ante* 228. and note. 1 *Black.* 651. S. C. See also *Ex parte*

[238] (Pp) *Whether during his Time of Privilege, he may be taken by his Bail.*

Ex parte Gibbons.

October the 22d, 1747.

Case 130.

Fescie a sheriff's officer, and bail for the petitioner, a bankrupt, takes him during the time of his last examination and surrenders him in discharge of his bail: he prays to be discharged out of custody, and that *Fescie* may be censured for a contempt of the court. *Lord Chancellor* inclined to think, that the bail's taking the principal coming to a court of justice to be examined, has never been determined to be a contempt of the court, provided they bring him to be examined by that court, and therefore dismissed the petition, but without prejudice to the bankrupt's application to the court of King's Bench. The taking of a bankrupt by his bail, is not a contravention of the 5 *Geo.* 2. for the act provides only against *arrests by creditors*, and bail are no creditors till damnified, and therefore not within the description.

THIS was a petition presented by the bankrupt against one *Fescie* a sheriff's officer, who was bail for the bankrupt in an action, for taking him away during the time of his examination before the commissioners on the forty-second day, and surrendring him in discharge of his bail, and keeping him in custody ever since, praying that he may be discharged out of custody, and that *Fescie* may be censured for his contempt of the court.

Lord Chancellor: This is a question of very great consequence, but merely a question of law, Whether *Fescie* could lawfully take the bankrupt, notwithstanding the statute of the 5 *Geo.* 2.

It is not absolutely necessary for me to determine it, because it may come in question in another place. But I am of opinion, the taking of the bankrupt by the bail is not a contravention of the act of parliament.

The words of the fifth clause in the act are, "the bankrupt "shall be free from all arrests, restraints or imprisonment, *of* "*his creditors*, in coming to surrender, and from the actual "surrender of such bankrupt to the said commissioners, for and "during

Ex parte Gibbons.

" during the ſaid forty-two days, or ſuch further time as ſhall " be allowed to ſuch bankrupt for finiſhing his examination.

The act provides againſt *arreſt by creditors.*

Bail are no creditors till damnified, and therefore are not within the deſcription.

The ſubſequent words of the clauſe are, " and in caſe ſuch " bankrupt ſhall be arreſted for debt, or on any eſcape warrant, " coming to ſurrender himſelf to the ſaid commiſſioners or after " his ſurrender, ſhall be ſo arreſted within the time before " mentioned, that then on producing ſuch ſummons or notice " under the hands of the commiſſioners, to the officer who ſhall " arreſt him, and making it appear to ſuch officer, that ſuch " notice or ſummons is ſigned by the ſaid commiſſioners, or " ſuch aſſignee or aſſignees, and giving ſuch officer a copy " thereof, ſhall be immediately diſcharged." [239]

It plainly appears, through the whole clauſe, to be confined to an arreſt, reſtraint, or impriſonment *by his creditors.*

Every perſon that is arreſted in the court of King's Bench is by bill of *Middleſex*, or *Latitat*, which recites the bill of *Middleſex*, and the bail-piece is, ſuch a one defendant *traditur in ballium ſuper cepi corpus, &c.* (naming the bail, their additions, and places of abode,) ſo that in the conſtant language of that court, the bail are his gaolers, and it is upon this notion the bail have an authority to take the principal, and he may be arreſted on a *Sunday*; for as he is only at liberty by the permiſſion and indulgence of the bail, they may take him up at any time.

In the language of the court, the bail are the gaolers of the principal, and upon this notion of law may arreſt him on a *Sunday*, as he has his liberty only by the indulgence of the bail.

Therefore to ſay, that an act of parliament ſhall prevent a perſon, who has been ſo kind as to give the principal his liberty, from taking him up in diſcharge of himſelf, would be very hard, eſpecially as there is no ſort of danger here to the bankrupt, of his being a felon, as the commiſſioners may examine him in gaol, and conſequently it in no ſort can be ſaid to be in contradiction to the act of parliament.

But Mr. Attorney General ſays, it is contrary to a known rule of law, *That* all who are ſummoned to appear before perſons acting in a judicial capacity, ſhall have a privilege to be ſafe from arreſts *eundo, et redeundo.*

I do not know that the bail's taking the principal coming to a court of juſtice to be examined as a witneſs, has ever been determined as a contempt of the court, provided they bring him to be examined by that court.

But I will not be underſtood to be bound by this opinion, or to have it cited in another place, which is the only proper place, the court of King's Bench, where he is ſurrendred, and it is that court only that can diſcharge the proceſs: for I cannot diſcharge the proceſs of a court of law in a ſummary way; however, I clearly think I ought not to puniſh *Feſsie* for a contempt in a doubtful caſe, and eſpecially where the man was in thoſe perilous circumſtances of paying the debt, if he had not ſurrendred his principal.

Therefore

Ex parte GIBBONS.

Therefore let the petition be dismissed, but without prejudice to any application the bankrupt may be advised to make to the court of King's Bench.

May the 12th, 1742.

(Q q) *Rule as to a Certificate from Commissioners to a Judge.*

Case 131.

Ex parte Lingood.

Ante 196. 2 Eq. Caf. Abr. 99. S. C.

The petitioner being declared a bankrupt, and the three fittings at *Guildhall* advertised, the commissioners upon the examination of witnesses, in the intermediate time finding that he was removing and concealing his effects, summoned him to appear before them the next day from the date of the summons, and on his refusing to come, certified this fact to Mr. Justice *Chapple*, who committed him to *Newgate*, and on the keeper's sending notice thereof to the commissioners, they brought him before them upon their own warrant, and, on his refusing to be examined, recommitted him to *Newgate*; the bankrupt petitioned now to be discharged, as being illegally committed. The court of opinion, the certificate is pursuant to the powers given to the commissioners under the statutes of bankruptcy, and that where they have full evidence of his intention to secrete his effects, they may examine him in the intermediate time between the declaration of bankruptcy, and the fittings at *Guildhall*.

UPON the 6th of *April* last the commission was sued out by *Jonathan Eade*, who had been formerly a partner with *Lingood*, but suspecting he was not justly dealt with, he dissolved the partnership, and brought his bill for an account.

After the cause had been depending some time in *Chancery*, upon the proposal of *Lingood*, all matters in difference were referred to arbitration, and the submission to the award was made a rule of court.

The arbitrators after fifteen months consideration awarded 9400*l.* to be due to *Eade* on a ballance of accounts, and directed this money to be paid by installments, and likewise awarded *Lingood* to deliver some amber and shells to Mr. *Eade*; but *Lingood* not appearing, nor any agent for him, on the day and place appointed for the delivery of the amber and shells, and for making one of the payments according to the award, attachments were made out against him into *London* and *Middlesex*, for a breach of the award; and upon his absconding to avoid his being arrested under the attachments, a commission of bankruptcy was taken out against him, and he was declared a bankrupt.

After the three fittings at *Guildhall*, *viz.* the 27th of *April*, the 8th and 22d of *May*, had been advertised in the *Gazette* for the bankrupt to surrender, and to discover his estate and effects, the commissioners in the intermediate time having met, and examined witnesses upon interrogatories, and finding upon such examination, that the bankrupt had been removing and concealing his effects, and fraudulently conveying away his real estate, in order to defraud his creditors, thought proper to summon him by their messenger on the 14th of *April*, to appear before them the next morning; and it appearing that he had been served with the summons, and refused to attend, the commissioners in pursuance of a clause in the 5th of the present King, certified this fact to Mr. Justice *Chapple*, who committed him to *Newgate*, and upon the keeper of *Newgate*'s sending a written notice

notice to the commiſſioners, that he had *Lingood* in his cuſtody, they immediately ſent their own warrant to bring him before them, and upon his refuſing to take the oath in order to his being examined, the commiſſioners re-committed him to *Newgate*, where he has lain ever ſince.

Ex parte LINGOOD.

Upon the 27th of *April*, *Lingood* preferred his petition to *Lord Chancellor*, ſuggeſting that he had been illegally committed to *Newgate*; that he was not indebted to *Eade* the petitioning creditor, and praying that he might be diſcharged from his confinement, and that his Lordſhip would pleaſe to direct an iſſue at law to try whether the petitioner was a bankrupt at or before the iſſuing of the commiſſion of bankruptcy againſt him, and that all proceedings on the ſaid commiſſion might be ſtayed in the mean time, and that his Lordſhip would enlarge the time for finiſhing his examination for 49 days, over and beſides the 42 mentioned in the *Gazette*.

Lord Chancellor: There are three things which are proper to be conſidered upon this petition;

1ſt, Whether the bankrupt has been illegally committed, and therefore ought to be diſcharged?

2dly, Whether an iſſue ſhould be directed to try the bankruptcy?

3dly, Whether the petitioning creditor's is a juſt and proper debt?

The laſt ought to be conſidered firſt, becauſe if there is no foundation for the petitioning creditor's debt, all the proceedings under the commiſſion muſt of courſe fall to the ground.

I think there can be no doubt as to the petitioning creditor's being a juſt debt, while the award ſtands, for the arbitration bond is a debt at law, and binds the parties, until it is ſet aſide for corruption or partiality, &c. And the bill which has been brought by *Lingood* for that purpoſe, cannot be a foundation to ſuſpend it; for if it was, a perſon then has nothing more to do but to file ſuch a bill, and fruſtrate the effect of the award; and therefore I think the debt is very ſufficient to ſupport the commiſſion.

An arbitration bond is a debt at law, and binds the parties, till ſet aſide for corruption or partiality, and is alſo a ſufficient debt to ſupport a commiſſion of bankruptcy.

The act of bankruptcy likewiſe is extremely plain, and attended with fraudulent circumſtances; I have not met with ſtronger in any caſe whatever, for *Lingood* appears to have acted intirely by the advice of his attorney Mr. *Vaughan*, who contrived the whole ſcheme of his going away to avoid the attachment of this court; and likewiſe the conveying away and ſecreting his effects is made out very clearly, from the depoſitions of ſeveral perſons who were examined before the commiſſioners; ſo that, in reality, here are no leſs than two diſtinct acts of bankruptcy; the one ariſing from his abſconding, and the other from his fraudulently conveying away his goods; and therefore there can be no reaſon to ſuperſede the commiſſion, or to direct an iſſue, as there is nothing but a general affidavit of the bankrupt, that he is not one, and that is by no means ſufficient; for he ought to have given a particular anſwer to the facts charged in the depoſitions taken before

The court will not ſuperſede a commiſſion, or direct an iſſue, upon a general affidavit of the bankrupt, that he is not one, but will leave him to bring a *habeas corpus* if he thinks proper.

Ex parte LINGOOD.

before the commissioners, and in the affidavits on the other side.

Where a person apprehends he is aggrieved by a commitment of commissioners of bankrupt, the ready way is to sue out a *habeas corpus*, that the legality thereof may be determined by the judges of the common law.

As to the legality of the commissioners' certificate to Mr. Jus. *Chapple*, and proceedings upon it, 'tis an entire new question, and quite a new case; and therefore at the first opening of it I had a great doubt, whether I could properly determine the legality of the commitment, as a *habeas corpus* might have been sued out, and have been decided by the Judges of the common law, which is the ready way. But I do remember a case of *John Ward* before Lord Chancellor *King*, not unlike the present, where he determined a commitment by commissioners of bankrupt to be justifiable, after he had taken some time to consider of it.

The old acts of parliament considered a bankrupt as a criminal, and commissioners might at their discretion imprison him; but though the rigour of the law is taken away, yet as to his person, the power of examining still remains, and a greater punishment is inflicted if he does not surrender, *viz.* felony without benefit of clergy.

I think therefore the certificate which has been made in this case is pursuant to the powers given to commissioners under the statutes of bankruptcy, for, by the old acts, which considered him as a criminal and fraudulent person (1), commissioners "had "full power and authority to take by their discretions such or-"der and direction with the body and bodies of a bankrupt, "wheresoever he or she may be had, either in his house, sanc-"tuary, or elsewhere, as well by imprisonment of his or her "body or bodies, as also with all his or her lands, &c. and also "with his or her money, goods, chattels, wares, merchandizes, "and debts whatsoever." 13 *Eliz. ch.* 7.

The rigour of the law indeed as to his person is taken away, and yet the power of examining still remains; but though the severity of the old acts is removed, yet a greater punishment is inflicted for a bankrupt, if he does not surrender; it is now made felony without benefit of clergy, but then he has to the last day to conform himself to this and the other acts.

The 5 *Geo.* 2 appoints three sittings at *Guildhall* in the space of forty-two days, for particular purposes; but would it not be a very great absurdity, if the bankrupt might make use of the forty-two days to imbezil his effects and to quit the kingdom; and that the commissioners, though apprized of his intention, should have no power to prevent it, by summoning him before them in the intermediate time, and committing him if he refuses to be examined?

The judge, upon the bare certificate of commissioners that a bankrupt refused to attend, tho' the cause of summoning is not mentioned, is obliged to commit him.

It has been objected by the petitioner's counsel, that the commissioners have made the certificate variant from the summons, for the latter is general for the bankrupt to attend, and the certificate mentions the cause for which they summoned him, namely, to examine him upon an imbezilment of his effects.

But there is no weight in this objection; for the commissioners were not under any necessity of mentioning *the cause of summoning the bankrupt* in their certificate, because the judge, upon their barely certifying that he refused to attend, is obliged to commit him.

(1) *Ante* 77. *Bromley* v. *Goodere*.

As

As in this case the commissioners had full evidence of the bankrupt's intention to secrete his effects, and to make fraudulent assignments of them, they have done *rightly, wisely, and discreetly* in the method they have taken to prevent it, by summoning the bankrupt, and committing him for disobeying their summons. *Ex parte* LINGOOD.

I do not say this to encourage commissioners of bankrupt to use this power wantonly; but upon such circumstances as appear in the present case, I am of opinion it was very properly exercised, and the proviso which immediately follows the clause that relates to the certificate of the commissioners of bankrupt to the judges, &c. in the 5 *Geo.* 2. makes it extremely clear, that the commissioners at their discretion may examine a bankrupt in the intermediate time, between his being declared a bankrupt and the sittings at *Guildhall*.

For the words are, "Provided always, that if any such per- "son or persons so apprehended and taken, shall, within the "time or times allowed by this act for that purpose, *submit to be* "*examined*, and in all things conform as if he, she, or they had "surrendered, as by this act such bankrupt or bankrupts is or "are required, that then such person so submitting and confor- "ming shall have and receive the benefit of this act, to all intents "and purposes, as if he, she, or they, had voluntarily come in "and surrendered himself, herself, or themselves; any thing "herein contained to the contrary thereof in any wise notwith- "standing."

But though I have no doubt as to the construction of this act of parliament, yet I do not mean to preclude the bankrupt from his *habeas corpus*, which I shall leave him at full liberty to bring, if he thinks proper.

His Lordship ordered, that so much of the petition as prays that the bankrupt may be discharged from his confinement, and which controverts his being a bankrupt, be dismissed; but the time for the bankrupt's surrendring himself and disclosing and discovering his estate and effects, and finishing his examination before the commissioners, be directed to be enlarged for the space of forty-nine days, to be computed from the 22d day of May instant.

(Rr) *The Effect of Acquiescence under a Commission.*

Ex parte Desanthuns. *June the 21st, 1735.*

Vide under the Division. Commission superseded.

(Ss) *Rule as to Debts carrying Interest under a Commission of Bankruptcy.*

November the 4th, 1743.

Bromley, and others, Creditors of Sir *Stephen Evance*, Plaintiffs

Goodere, surviving Assignee of Sir *Stephen Evance*, and others, — — — } Defendants.

Vide under the Division, Rule as to the Certificate.

August the 15th, 1746.

Ex parte Marlar & al'.

Vide under the Division, Rule as to discounting Notes.

December the 22d, 1753.

Ex parte Rooke.

Case 132.

On the 10th of *April*, 1744, it was referred to a Master to settle what was due to the creditors under the commission against Rooke, and upon payment by the bankrupt the commission to be superseded. The bankrupt now offers to pay what is reported due, but the creditors insist upon interest likewise from the date of the Master's report. The creditors here are equally intitled, as if they were in the common case of a reference to a Master in a cause to state what is due for principal and interest, to be paid interest from the time of the Master's report, when the sums due are liquidated. And the bankrupt ordered to pay in a month accordingly.

BY an order dated the 10th day of *April* 174¾, *Lord Chancellor* directed that it should be referred to Master *Eld* to settle what was due to Mr. *Smales*, and the rest of the creditors who had proved their debts under the said commission, and upon payment by the bankrupt of what the Master should report due to them respectively, the commission was ordered to be superseded.

On the 16th of *March* 1744, the Master certified there was due to the executors of *Smales* for his debt, and charges under the commission 277*l.* 1*s.* 8*d.* ½. and to the other creditors such several sums as are stated in the report.

The present petitioner, the bankrupt, offers to pay what is so reported due, but the agent for the executor *Smales*, and the rest of the creditors, refuse to take the 20*s.* in the pound, unless they have interest likewise from the date of the Master's report.

N. B. The debt to *Smales* was a draft given by the bankrupt to him for value received, but not expressed in the body of it that it should carry interest.

Lord Chancellor: It is very near ten years ago since the pronouncing the last order, and the Master's report is ever since *March* 174¾.

[245] The petitioner's excuse is, that when he made the offer of paying 20*s.* in the pound, he had a reversion in a freehold estate only, which is now fallen into possession; but this will not avail him; because at the time I directed the commission to be superseded, I did it altogether upon his offering to pay immediately the whole debts to the creditors under the commission.

Therefore they are equally intitled as if they were in the common case of a reference to a Master in a cause, to state what is due for principal and interest, to be paid interest from the time of the Master's report when the sums due are liquidated.

His

His Lordſhip ordered the petitioner to pay the principal and intereſt in a month accordingly, to all his creditors (1).

Ex parte ROOKE.

(1) *Bromely* v. *Goodere*, *ante* 75. *Ex parte Marlar*, *ante* 151.

(T1) *Rule as to Principals and their Factors.*

Snee and *Baxter*, Aſſignees of the Eſtate of *John Tollet*, a Bankrupt. — — } Plaintiffs.

February the 23d, 1743.

Preſcot, *Dawſon*, *Julian* and *Le Blon*, *Thomas* Elder and Younger, and *Tollet*, } Defendants.

THE plaintiffs made the following caſe by their bill: That *Tollet* in 1740 conſigned to *Ragueneau* and company, reſiding at *Leghorn*, *German* ſerges amounting to 2062*l.* 11*s.* beſides the inſurance made by *Tollet*, with directions to the partners to ſell the goods as ſoon as they could; and alſo conſigned to them other goods to the value of 181*l.* 11*s.* 6*d.* The partners not being able to ſell all the goods, *Tollet* gave orders to barter them for *Italian* goods, and the copartners agreed that part of the goods ſhould be diſpoſed of for thoſe of the growth of *Italy* to half the value of the *Italian* goods, and the other to be paid for in money; and afterwards, by letter of the 18th of *November* 1741, they adviſed *Tollet* thereof, and that they ſhould load the goods, which were ſilks, on board the *Prince Edward*, and incloſe a bill of lading for 12 bales. *Tollet* in 1741 received the bills of lading indorſed by the ſaid partners, but intended for the uſe of *Tollet* only.

Caſe 133. Where agents abroad are in diſburſe for their principal, and upon being doubtful of his circumſtances make bills of lading to their own order indorſed in blank, notwithſtanding the bills of lading come to the principal's hands, yet if the agent's partner in *London* writes them word that their principal is become bankrupt and deſires them to ſend the bills of lading, and an order to the captain to deliver the goods to him, he may retain them for himſelf and company againſt the aſſignees under the commiſſion till paid, and reimburſed ſo much as the partnerſhip is in advance.

Tollet, in 1741, borrowed of the defendants *Julian* and *Le Blon*, 505*l.* and by way of ſecurity aſſigned the bills of lading for the 12 bales. *Tollet* being alſo indebted to the other defendants the *Thomas's* in ſeveral ſums, for ſecuring thereof he aſſigned invoices for five bales and three bales, and delivered the ſame to the *Thomas's*.

Soon after a commiſſion of bankruptcy iſſued againſt *Tollet*, and the plaintiffs were choſen aſſignees, and received a letter, directed to *Tollet* from *Ragueneau* and company, mentioning that they had bought four bales of ſilk more for him, and had given in payment for it four bales of ſerges, and ſent him the invoice of 2448 dollars, which they had placed to *Tollet*'s debt (1). [246]

On the 10th of *February*, 1741, *Dawſon* the captain of the *Mermaid*, on board of whoſe ſhip were the bales of ſilk, arrived, *and theſe goods were conſigned to* Tollet, *and were ſhipped at the riſque and in the name of* Tollet; the defendants *Julian* and *Le*

(1) But the bills of lading were not ſent. *Reg. Lib. B.* 1743. *f.* 280.

 Blon,

Snee v. Prescot.

Blon, and the *Thomas's* shewed *Dawson* the bills of lading, and demanded the goods, but he refused to deliver them, and *Prescot* partner of *Ragueneau* who lived in *London*, on *Tollet*'s being a bankrupt, wrote to his partners, desiring them to send the bills of lading that *Dawson* had signed and left with them, which they sent to him accordingly, and at the same time sent an order to *Dawson* to deliver the goods to *Prescot*, (1) who sets up a right thereto.

But the plaintiffs insist, that the bills of lading, though made to the order of *Ragueneau* and company, *yet being indorsed by them in blank and sent to* Tollet, it did, according to the custom of merchants, vest the property in *Tollet*: And further, that it is the custom of merchants at *Leghorn*, to send bills here filled up as aforesaid, in order to conceal the persons' names to whom the goods are sent, that the publick may not know the persons in *England*, with whom such houses deal, or to whom the property belongs.

That at the instant the goods were loaded on board the *Prince Edward*, the property vested in *Tollet*, who was then in good circumstances, and the reason of the master of the ship's signing several bills of lading, is for fear of losing one: That it is the custom of merchants to borrow money upon bills of lading, which have been looked upon as a good security: That *Tollet* was made debtor for the goods in *Ragueneau* and company's books, and the delivery to *Dawson* was for the use of *Tollet*, whose loss it would have been, if lost in the voyage.

That the defendants *Le Blon* and the *Thomas's*, notwithstanding they have an assignment of the bills from *Tollet*, yet do admit they were only pledged to them for what was owing on the sums they had lent, and upon payment of that, and the expence of the insurance, they are willing the goods should be delivered to the plaintiffs, who pray by their bill, that the goods brought by *Dawson*, and delivered to *Prescot*, may be sold, and after paying what shall appear to be due to *Le Blon* and the *Thomas's*, that the remainder may be paid to plaintiffs for the benefit of *Tollet*'s creditors; and also, that the bills of lading for the four bales sent in the *Mermaid*, may be delivered to the plaintiffs.

The defendant *Prescot* insisted, that the bills of lading in the *Prince Edward*, were not to deliver the goods to *Tollet*, but to the order of *Ragueneau* and company, and that it is usual among merchants, to require the master of the ship, by which the goods
[247] are consigned, to subscribe his name to three parts of every bill of lading, and that there is a clause in each, that one being accomplished, the other two shall be void, and says, on the delivery of the goods, he wrote a receipt for them, by indorsement of the bills of lading transmitted to him, and delivered the same to *Dawson*.

That it is usual among merchants and factors at *Leghorn*, when they ship goods for persons who have not remitted them the money before-hand, or for which they draw bills of exchange

(1) Who received the same.

or

or where they run a riſque, not to fill up the bill of lading directly to the order of ſuch perſon, but to the order of the ſhippers or factors; ſo that if any accident happen to their principal, before the delivery of the goods, they may get back the ſame, and thereby reimburſe themſelves, and that there was the greater reaſon for ſuch precaution, in regard *Ragueneau* and company had, and were to draw on *Tollet* for 2757*l*. 19*s*. 3*d*. for money advanced on the barter of the woolien goods for ſilk. Snee v. Prescot.

That being informed *Tollet* had ſtopt payment, and was in danger of failing, and that the ſilk was about to be ſhipped by the partners at *Leghorn*, for the account of *Tollet*, he reſolved to prevent the ſilk falling into *Tollet*'s hands till ſatisfaction was made, and thereupon wrote by the next poſt to his partners, who in their anſwer ſent the two parts of the bill of lading to be delivered to *Dawſon*, and an order for him to deliver the ſilks to *Preſcot*, according to the bills of lading, in preference to any other claim.

That his partners at *Leghorn* having notice of *Tollet*'s circumſtances ſoon after ſhipping the four bales of goods, applied to the perſon with whom they made the barter, and prevailed with him to relinquiſh the bargain, and they took the ſerges back again, and the ſilks to their own account, and paid for them in money, and then ſent them to the defendant *Preſcot* in *London*, who inſiſts he hath a right to claim the ſame for himſelf and his partners (1).

By his anſwer he ſaith he his willing to ſell the ſilks he received of *Dawſon* as the court ſhall direct, but ſubmits that the delivery of the ſilks to *Dawſon*, was not a delivery to the uſe of *Tollet*.

The defendants the pawnees inſiſted that *Ragueneau* and company's indorſement on the bills of lading was, according to the uſage of merchants, as much a transfer of all their right to *Tollet*, as if the ſame had been ſold in an open exchange, and that the ſubſequent aſſignment made by *Tollet* to them, veſted the property of the goods in the defendants for repayment of the money ſo lent.

Lord Chancellor: This is as harſh a demand againſt *Ragueneau* and company, as can poſſibly come into a court of equity: to inſiſt on taking their goods for which they have paid half the price, without reimburſing them what they are out of pocket, and then telling them that they ſhall come in as creditors, perhaps for half a crown in the pound only, under the commiſſion of bankruptcy againſt *Tollet*, notwithſtanding they have the goods now in their own cuſtody, and a ſpecifick lien upon them; and to be ſure, in ſuch a caſe, a court of equity will lay hold on any thing to ſave this advantage to *Preſcot* and the partnerſhip,

If *Tollet* the bankrupt had gained any legal property in the ſilks, it was gone by his *aſſignment*, or *pledge* or *pawn* to the defendants *Le Blon*, &c. call it which you will, and if it had not been for this circumſtance of their being ſo pledged, the aſſignees' bill ought to have been diſmiſſed with coſts. [248]

(1) The bill as to theſe four bales was diſmiſſed. *Reg. Lib. B.* 1743. *f.* 283.

Snee v. Prescot.

But this court is obliged to retain bills for redemption, because the parties have no other way of coming at justice.

There are twelve parcels or bales for which bills of lading are sent, and four parcels or bales for which no bills of lading were sent, and therefore I will deliver the case from the latter, as there can be no pretence that *Tollet* had a legal property in these, for a promise to send a bill of lading, if it amounted to any thing, would be only to be carried into execution in equity.

As to the twelve bales, they will fall under a different consideration,

Ragueneau and company having advanced a moiety of the price for the silks, there can be no question, while the goods remained in their hands, but they were liable to this debt, (*a*) and *Tollet* could never have compelled them to deliver the goods, without paying the money so advanced.

(*a*) See ante ex parte Dunn, 234, note 1.

A factor who sells goods for a principal, may bring an action in the name of the principal against the vendee, and make himself a witness, or a vendor of goods to a factor for the use of his principal, may maintain an action against the principal, and the factor may be a witness for the vendor.

If a factor sells goods for a principal, he may bring an action in his own name, or an action may be brought in the name of the principal against the vendee, and the factor may make himself a witness.

On the other hand, a vendor of goods to a factor for the use of his principal, may maintain an action against the principal for goods sold, and the factor may be made a witness for the vendor; it has been often so settled at *Guildhall*.

Therefore while the goods remained in the hands of *Ragueneau* and company, no doubt but they had a lien upon them, for the moiety of the price adv[illegible] by the [illegible] *and he who would have equity, must do equity*, by reimbursing them first, before he can intitle himself to the silks, and thus it would have stood, if there had been no *consignment*, which it is insisted makes a considerable alteration, and vests the property in *Tollet*.

If goods are delivered to a carrier, &c. to be delivered to *A.* and are lost by the carrier, &c. the *consignee* can only bring the action. But if before delivery consignor hears *A.* is likely to become a bankrupt, or is actually one, and gets the goods back again, no action will lie for the assignees of *A.* because, while *in transitu*, they may be countermanded.

I admit the case mentioned by the plaintiff's counsel, of inland dealers in *England*, that if goods are delivered to a *carrier* or *hoyman* to be delivered to *A.* and the goods are lost by the carrier or hoyman, the *consignee* can only bring the action, which shews the property to be in him, and it is the same where goods are delivered to a master of a vessel.

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But suppose such goods are actually delivered to a carrier to be delivered to *A.* and while the carrier is upon the road, and before actual delivery to *A.* by the carrier, the consignor hears *A.* his *consignee* is likely to become a bankrupt, or is actually one, and countermands the delivery, and gets them back into his own possession again, I am of opinion that no action of trover would

would lie for the assignees of *A.* because the goods, while they were *in transitu*, might be so countermanded (1). SNEE v. PRESCOT.

In the present case there was no consignment to any particular person, but bills of lading indorsed in blank to the order of consignor, and therefore rather in the nature of an authority than any thing more.

Promissory notes and bills of exchange are frequently indorsed in this manner, *Pray pay the money to my use*, in order to prevent their being filled up with such an indorsement as passes the interest. Mr. *Lutwych*, who was an experienced practiser in this court, always did so in his bills of exchange.

Notes or bills indorsed in this manner, *Pray pay the money to my use*, will prevent their being filled up with such an indorsement as passes the interest.

The question of law is, Whether before the actual delivery of the goods it was not in the power of the consignor to countermand it?

This must depend upon the custom of merchants, and here indeed there is a contrariety of evidence. For the defendant *Prescot* the evidence is, that if agents are in disburse for the goods bought for their principal, they generally make bills of lading to their own order, indorsed in blank, especially where they are in doubt of the principal's circumstances, that they may by this means have it in their power, if they should see occasion, to vary the consignment.

The evidence for the plaintiff is, that indorsing bills of lading in blank does not retain the property in the consignor, any more than if they were indorsed to the consignee by name, but is done only to conceal the amount of the quantity of the goods consigned, it being detrimental to the consignee that it should be known.

But then the proof on the part of the plaintiff does not speak as to the particular circumstances, where the agents suspect their principals to be failing.

The question is, On which side the evidence is strongest?

The strongest proofs are certainly on the part of the defendants, and there is no occasion to send it to law on this account.

Though goods are even delivered to the principal, I could never see any substantial reason why the original proprietor, who never received a farthing, should be obliged to quit all claim to them, and come in as a creditor only for a shilling perhaps in the pound, unless the law goes upon the general credit the bankrupt has gained by having them in his custody.

The reason the law goes upon in compelling an original proprietor of goods, after delivery, to come in as a creditor under a commission, must be on account of the general credit a bankrupt has gained by having them in his custody.

But while goods remain in the hands of the original proprietor, I see no reason why he should not be said to have a lien upon them till he is paid, and reimbursed what he so advanced; and therefore I am of opinion the defendant *Prescot* had a right to retain them for himself and company.

It has been *insisted, that in case of any loss or accident to the goods, it was Tollet's risque only.*

But suppose any damage had happened to these goods during the voyage, and *in transitu*, there had been an alteration of the consignment,

(1) *Birkit* v. *Jenkins, cited Cowp.* 296. *Ellis* v. *Hunt*, 3 *Durn. and East*, 464.

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consignment, the loss clearly must have been borne by the consignor.

Consider this case in the next place, under the act of parliament of the 5 *Geo.* 2. upon the clause of mutual credit.

"Where it shall appear to the commissioners that there hath "been mutual credit given by the bankrupt and any other "person, or mutual debts between the bankrupt and any other "person, at any time before such person became bankrupt, "the commissioners or the assignees shall state the account between them, and one debt may be set against another, and "what shall appear to be due on either side on the balance of "such account, and on settling such debts against one another, "and no more, shall be claimed or paid on either side respectively."

The construction on this clause has always been, that an account must be taken of their respective demands, and that the balance only, if in favour of the bankrupt, shall be proved under the commission.

Suppose *Toliet* had never assigned these goods and the assignees under the commission of bankruptcy had brought an action of trover in his right, and by strictness of law had recovered, would even the courts of law have suffered execution to be taken upon the whole goods? I think they would not; and in that case I would have directed that out of the damages, upon a writ of inquiry, there should have been deducted the half price, paid by *Ragueneau* and company for the silks; *a fortiori* this ought to be done in a court of equity.

As to the cases cited, *Wiseman* v. *Vandeput*, 2 *Vern.* 203. is much stronger than the present. There "*A.* being beyond sea, "consigns goods to *B.* then in good circumstances in *London* "but before the ship sets sail news came that *B.* was failed, "and thereupon *A.* alters the consignment of the goods, and "consigns them to the defendant; the court held, that if *A.* "could by any means prevent the goods coming into the hands "of *B.* or his assignees, it is allowable in equity, and *B.* or his "assignees shall have no relief in equity." And so is the case *ex parte Clare*, before Lord Chancellor *King*, for the goods there had been actually delivered.

If the defendant *Prescot* had got the goods back again by any means, provided he did not steal them, I would not blame him; and I am of opinion, that to take them from him would be extremely unequitable.

In the case *ex parte Frank*, before Lord *Talbot* the goods were actually delivered, here they are not.

Upon the whole, from the justice of the case, and from the evidence on the custom of merchants; *Declare, as to the four bales of silk, that the same being in the possession of* Prescot *and his partners, the said bales or the value ought not to be taken from them, without satisfaction made them for the money laid out by them on the last mentioned bales and charges incident thereto, and for their commission thereon.*

Let the Master take an account of the money received by Prescot *by sale of the silks, and he and his partners to be charged with the same.*

same. Let the silk remaining in specie be sold, and the Master is to distinguish what is the produce of the silk comprized in the pledges to the several pawnees, let the same be rateably applied to pay what shall be due to Prescot *and partners, for the money advanced for the last mentioned bales, charges and commission, according to the proportion which the same bears to the respective values of the particular bales of silk comprized in each of the pledges, and after such proportion as is to be borne out of the value, the residue to go towards paying* Julian *and* Le Blon, *for their principal and interest, and also after the like deduction to* Prescot *for the silks pledged to the* Thomas's, *the residue to be applied towards payment of principal and interest to the* Thomas's, *and if not enough to pay* Julian *and* Le Blon *and the* Thomas's, *they to come in as creditors under the commission in proportion*; and if any overplus by the sales of the silk, the same to go towards paying the costs of *Prescot* and partners, *Julian*, *Le Blon*, and the *Thomas's*; if no overplus, the Master to rate the costs between them; and if any overplus after payment of the said debts and costs, the same to be paid to the assignees of the bankrupt, for the use of the other creditors (1).

SNEE v. PRESCOT.

(1) *Reg. Lib. B.* 1743. fol. 280. 283. See *Lickbarrow* v. *Mason*, 2 *Durn. and East* 63. *and Salamons* v. *Nissen ibid.* 674. By the judgment of the *King's Bench* in the former of these cases the principles laid down in the above case of *Snee* v. *Prescot* were much shaken; but that judgment was afterwards reversed in the the *Exchequer Chamber*; and the foregoing doctrine in *Snee* v. *Prescot* was established in its fullest extent, *viz.* that a *consignor* may stop goods *in transitu*, tho' the *consignee* assign the bills of lading to a third person for a *valuable consideration* and *without notice*. *Hen. Black. Rep.* *C. B.* 357. However the House of Lords have since ordered, that a *venire facias de novo* should be awarded in this case. 5 *Durn & East*, 367. *Vide Fearon* v. *Bowers*, *Hen. Black. Rep.* 364.

(Vv) *Rule as to Annuities under Commissions of Bankruptcy.*

Ex parte Le Compte.

August the 1st, 1738.

Case 134.

IN the year 1720, the petitioner gave three hundred pounds for an annuity of 30*l.* *per ann.* for her life, payable out of the estate of the person who is now a bankrupt, which he not being able to pay her by reason of the commission, she petitioned to be admitted a creditor for the whole 300*l.*

Lord Chancellor ordered that it be referred to the commissioners to settle the value of her life, and that she be admitted a creditor for such valuation, and the arrears of her annuity, it being unreasonable she should have the whole 300*l.* when she had enjoyed the annuity 18 years (1).

C. in 1720 gave 300*l.* for an annuity of 30*l.* *per ann.* for her life, payable out of a person's estate who becomes a bankrupt in 1738. Commissioners directed to settle the value of her life, and *C.* to be admitted a creditor for such valuation and the arrears of her annuity, and not for the whole 300*l.*

(1) *Ex parte Belton*, the next case. *Ex parte Artis*, 2 *Ves.* 489. *Perkins* v. *Kempland*, 2 *Black.* 1106. *Wylie* v. *Wilkes*, *Doug.* 501. Where an annuity is secured by *covenant* in a deed, See *Fletcher* v. *Bathurst*, 7 *Vin.* 71. *pl.* 4. *Cotterel* v. *Hooke*, *Doug.* 93.

August the 1st, 1744.
Case 135.
See the preceding case.
Where a bankrupt is under an agreement to pay an annuity, a value must be put upon it, and proved as a debt under the commission.

Ex parte Belton.

A Bankrupt before the time of his bankruptcy entered into an agreement to pay an annuity of 20*l.* a year for the maintenance of an infant till his age of fourteen, with a penalty on non-payment.

By his failing in one of the payments, the penalty becomes forfeited.

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The guardian of the infant who had maintained him, applies to the court by petition to have a value set on this annuity, and that the infant may be admitted a creditor for such value.

Lord Chancellor: I am of opinion that a value ought to be put upon the annuity, that it should be proved as a debt under the commission.

January the 22d, 1753.

Ex parte Coysegame.

Vide under the Division, Where Assignees are liable to the same Equity with the Bankrupt.

(Uu) *Rule as to taking out a second Commission.*

March the 20th, 1743.
Case 136.
No second commission can be taken out before a bankrupt has his certificate under the first, for till then nothing can pass to the second, at least of personal estate.

Ex parte Proudfoot.

ONE *Jackson* became a bankrupt in 1732, and assignees where chosen under the commission; upon *Jackson*'s raising forty pounds to defray the expences of the commission, and a hundred pounds more to be divided among his creditors, four parts in five of them in number and value signed his certificate, but the commissioners refused to sign it; upon which the creditors returned the money to *Jackson* again, and nothing further was done under that commission.

Jackson after this sets up a different trade, in a different part of the town, and being largely indebted, a second commission is taken out against him in 1736, and assignees were chosen under it, and his certificate signed and allowed by *Lord Chancellor.* Before the certificate was signed, an advertisement, by order of the assignees under the first commission, was put into the *Gazette* for *Jackson*'s creditors to meet the new assignees, to give their assent or dissent to the certificate, and 39 letters were also written to the creditors under the first commission, to appear at this meeting. Great numbers of them came, and [illegible] all assent to the certificate; and at the same meeting, by agreement, the sum of 65*l.* was paid to the assignees under the first commission to defray the charges thereof, by the assignees of the latter.

The present petition was presented by two of the creditors under the first commission to supersede the second.

Ex parte PROUDFOOT.

Lord Chancellor: The first question, Whether the second commission can have any effect, and if it ought to be superseded?

The second question, Whether the agreement made in this case will preclude the court from superseding it?

As to the first question, I am of opinion that if this case stood clear of the agreement, the second would have issued irregularly, and I should without scruple have set it aside, and *the certificate likewise; because when assignees are chosen under a first commission, all the estate and effects of the bankrupt are vested in them, and he is incapable of carrying on any trade, and all his future personal estate is affected by the assignment, and every new acquisition will vest in the assignees (1); *but as to* future real estates, there must be a new bargain and sale.

All future personal estate is affected by the assignment, and every new acquisition will vest in the assignees; but as to future real estate, there must be a new bargain and sale.

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The bankrupt is incapable of acting, and therefore no second commission can be taken out before he has his certificate under the first, for till then nothing can pass under the second, at least of personal estate; consequently the certificate here can have no operation at all, and I am of opinion it would have been void at law.

There may have been instances where second commissions have been taken out, when former commissions have been deserted, and the assignees perhaps, and the commissioners dead, and this improvidently, and may have passed *sub silentio*, but is by no means a rule to govern the court.

The second question is, Whether the acts done by the assignees under the commission, will give a sanction to the certificate.

The second commission was taken out four years after the first, the certificate signed three years ago, and allowed by me two years and three quarters; nothing clandestine appears; but an advertisement has been put into the *Gazette* as usual, for creditors assenting or dissenting to the certificate, and was plainly intended that the creditors under the first commission should meet because the advertisement was put in by the assignees under the first, the two assignees under the first, and several of the creditors met accordingly, and accept of 65 *l.* towards the charges of the first commission, and the expence of a law-suit, and in consideration of this sum, the assignees of the first commission withdrew their petition, which was filed before this meeting for superseding the second commission.

I am of opinion therefore, on the circumstances of this case, that I cannot set aside the second commission, because it would be a great prejudice and injustice to those persons who have given *Jackson* credit ever since his certificate was confirmed, which is no less than two years and three quarters ago.

(1) *Ex parte Simpson, ante* 138. 1 *Cooke's Comp.* 524. *Ex parte Hardcastle*, 1 *Cooke's B. Laws*, in margin. *Martin* v. *O'Hara*, *B. Laws* 8.

Though

Ex parte PROUDFOOT. Assignees may advertise a meeting upon any extr ordinary occasion, that concerns the creditors, as well as for the particular purposes directed by the acts of parliament.

Though the acts of parliament relating to bankrupts do only direct the assignees to advertise a meeting of creditors in relation to commencing suits, and for particular purposes, yet the assignees are very much to be commended for advertising meetings upon any other extraordinary occasion, that concerns the creditors, because, where they are numerous, there is no way so good to collect the whole body together.

The present is a stronger case than usual, for the assignees are trustees for all the creditors, and if they have acted improperly, the persons who prefer this petition, may have their remedy against them at law, for a breach of trust.

[254] Upon the whole, after all that has been transacted between the assignees under the first, and the creditors under the second commission, in relation to the certificate, and after the bankrupt has been once more enabled to trade, and gained a new credit by my confirming his certificate, I should do very wrong, if I set aside the second commission under all these circumstances; *and therefore the petition must be dismissed.*

(Ww) *Rule as to an open Account under a Commission of Bankruptcy.*

December the 22d, 1744.

Ex parte Simpson and others.

Vide under the Division, Concerning the Commission and Commissioners.

(Xx) *Rule as to Principal and Surety.*

August the 2d, 1744.

Ex parte Crisp.

Vide under the Division, Rule as to Partnership.

March the 26th, 1750.

Ex parte Williamson.

Vide under the Division, Rule as to the Certificate.

(Yy) *Rule as to the Insolvent Debtors Act.*

Ex parte Burton.

October the 26th, 1744.

Case 137.

Stevens formerly a trader in *Holland* fails there, upon which there was a *cessio bonorum*: He comes to *England*, and is appointed a governor abroad; he applies to the petitioner to be his security to the company, and to advance him a sum of money, who agreed to it, provided *Stevens* would give him a bond, that should comprize the remainder of an old debt due before the *cessio bonorum* as well as the further sum advanced, which was done accordingly: *Stevens* becomes a bankrupt, and the commissioners doubting if *Burton* ought to be admitted a creditor for the whole money, he now petitions for that purpose.

Lord Chancellor, on the circumstances of the case, of opinion he was intitled to be admitted a creditor for the whole money upon his bond.

THE petitioner was a bond creditor for fifteen hundred pounds of *Stevens* the bankrupt, who had lived formerly in *Holland*, and exercised a trade there, but failed, upon which there was a *cessio bonorum*. *Stevens* comes afterwards to *England*, and had interest enough to be appointed a governor of a settlement abroad, belonging to the *African* company, and applies to the petitioner to be his security to the company, and to advance him a sum of money to equip him properly in his office: The petitioner agreed to do it, but insisted, as he run a risque of forfeiting the security to the company on *Stevens*'s misbehaviour, that the bond should comprize the remainder of the old debt, as well as the further sum advanced, which was done accordingly: *Stevens* becomes a bankrupt here, and a commission is taken out against him; the commissioners on the application of *Burton* to be admitted a creditor, for the whole money on the bond, being doubtful whether he was so intitled, refused to admit him, and he now petitions for that purpose.

Lord Chancellor: The question is, Whether this be such a real debt as to intitle the petitioner to come in amongst the rest of the creditors under the commission of bankruptcy against *Stevens*, and that will depend upon another question, Whether the composition in *Holland* was an absolute discharge of the bankrupt? and if it was, Whether there is still a sufficient consideration for this bond? for if it was not an absolute discharge in *Holland*, no question can arise.

A man indebted to several persons becomes a bankrupt in *Holland*, where there are the same proceedings upon an insolvency, as on a *cessio bonorum* among the *Romans*: The question is, Whether this proceeding is a discharge of his effects, as well as of his person? for if it was, it would be an absolute discharge of this debt.

Upon what appears before me, I do not take it to be the law of *Holland*, that it is an absolute discharge of the effects as well as of his person: it certainly was not so even by the law of *England*, till the statute of the 4 & 5 *Ann.* which was temporary at first, and never intended to be a perpetual law, but was made in consideration of two long wars which had been very detrimental to traders, and rendered them incapable of paying their creditors; but I much question whether it is so by the law of any other country except *England*; the exempting his wearing

Ex parte BURTON.

ing apparel or tools of his trade, was left to the discretion of the *Roman Prætor*, but was not a binding law upon him there, as it is here.

If a debtor cleared under the insolvent acts afterwards gives a bond for the residue of the old debt, this will be binding upon him.

Can it then be doubted, that if the bankrupt gives a new security, that his effects are all liable? Suppose by our law under the insolvent acts, the debtor delivers up his all, as the statute requires, which is the *cessio bonorum* of the *Romans*, and the justices of peace discharge his person, and he afterwards gives a bond for the residue of the old debt; will not this be binding upon him, notwithstanding his being cleared under the insolvent act?

If a bankrupt, after his discharge, gets future effects, in point of justice he ought to make good the deficiency, tho' no court will compel him.

In the present case, I think I might rest here, without going any further; but supposing, by the law of *Holland*, his person and effects were actually discharged, I am very far from being clear, whether a bond given, as this was, for the residue of a debt, would not make his effects liable to answer it; for if a bankrupt after his discharge gets future effects, in point of justice and conscience he ought to make good the deficiency, tho' no court of equity or prætor would do it for the creditor.

Here is a man wants a security to the *African* company, for his exercising an office of governor in one of their settlements, and likewise a sum of money; was it not very reasonable for the petitioner upon such an application to say, if I do this, you shall give me a bond for the residue of my old debt, since I run a risque of forfeiting to the company if you misbehave?

I am of opinion on such a case so circumstanced, that the petitioner is intitled to be admitted a creditor for the whole money upon his bond, and lay no stress upon the word composition, in the determination in *Holland*, for it was a disposition made by the judge, and not a voluntary composition by the bankrupt.

Lord Chancellor seemed to think, if a bankrupt, after a discharge, applies to an old creditor, to lend him a new sum of money to carry on his trade, or to be his security for any office, this would be a good consideration for his giving bond for the remainder of the old debt, and the whole may be proved under a second commission.

If a bankrupt applies to an old creditor, after a discharge by certificate, to lend him a new sum of money, to carry on his trade, or to become a security for any office; I am inclined to think that this ought to be a good consideration for his giving bond for the remainder of the old debt, and that he ought to be admitted a creditor for the whole debt under the second commission; but I will not be bound down by this opinion, though as I am at present advised, I think it would be so (1).

The law of *Holland* with regard to a *cessio bonorum* follows the *Digest*, and is no discharge of effects, but only of the person.

The next day *Lord Chancellor* said, he had looked into *Voet on the Pandect*, under the head of *cessio bonorum*, 2 *tom. lib.* 42. *tit.* 3. who lays down the law of *Holland* exactly as the *Digest* does in such cases, that it is no discharge of effects, but only of the person, some few trifles, as wearing apparel, &c. excepted

(1) See *Spurret* v. *Spiller*, *ante* 105, *note* 1.

Ex parte Green.

August the 7th, 1746.

Case 138.

Where a person discharged by the insolvent debtors act, becomes a bankrupt afterwards, his certificate must be special, and will be allowed only as a discharge of his person, but not of his future estate and effects.

THE petitioner is an assignee under a second commission of bankruptcy against *Bowler*, who had been discharged once before under a former commission, afterwards again under the insolvent debtors act, and now by a certificate under a second commission, taken out by his friends for that purpose.

The prayer of the petition is, That the bankrupt's certificate may not be allowed, and insisted by the assignee's counsel, that according to a clause in the act made in the 5 *Geo.* 2. relating to future effects, he cannot be discharged by a certificate, as to his estate under a commission of bankruptcy, if he has been before discharged under the statute for relief of insolvent debtors.

That clause is as follows:

" Provided always, and be it further enacted, That from and " after the 24th of *June* 1732, in case any commission of bank- " ruptcy shall issue against any person or persons, who, after the " said 24th of *June* 1732, shall have been discharged by virtue " of this act, or shall have compounded with his creditors, or " delivered to them his estate or effects, and been released by " them, or been discharged by any act for the relief of insolvent " debtors, after the time aforesaid, that then and in either of " these cases, the body and bodies only of such person and per- " sons conforming as aforesaid, shall be free from arrest and im- " prisonment by virtue of this act; but the future estate and ef- " fects of every such person and persons shall remain liable to " his creditors, as before the making of this act, (the tools of " trade, the necessary houshold goods and furniture, and neces- " sary wearing apparel of such bankrupt, and his wife and chil- " dren only excepted), unless the estate of such person or per- " sons against whom such commission shall be awarded, shall " produce clear, after all charges, sufficient to pay every credit- " or under the said commission, fifteen shillings in the pound " for their respective debts."

Unless some fraud had been shewn, this man seems to me to be intitled to his certificate, but of a special nature.

This act of parliament has made two provisions one with regard to the person of the bankrupt, the other with regard to his estate, for before the making the said act, neither were discharged, but both were liable.

Then comes this clause, and makes a particular kind of discharge in this special case; an absolute one as to his person, with regard to all his creditors before the commission, but upon a particular circumstance only, with regard to his estate.

Therefore some kind of certificate he must have, the present [258] seems to be a general one, and I do not find that the form of the certificate is settled.

The certificate being read, appeared to be a general one, whereupon *Lord Chancellor* made it special, by ordering this certificate to be allowed a discharge of the bankrupt's person only, but not of his future estate and effects.

(Zz) *Rule as to a Bankrupt's future Effects.*

March the 20th, 1743.

Ex parte Proudfoot.

Vide under the Division, Rule as to taking out a second Commission.

October the 26th, 1744.

Ex parte Burton.

Vide under the Division, Rule as to the Insolvent Debtors Act.

August the 7th, 1746.

Ex parte Green.

Vide under the same Division.

(Aaa) *Rule as to a Cessio Bonorum.*

October the 26th, 1744.

Ex parte Burton.

Vide under the Division, Rule as to the Insolvent Debtors Act.

[259]

(Bbb) *Rule as to Deposits under Commissions of Bankruptcy.*

October the 19th, 1744.

Bromley v. *Child.*

Case 139.

A. intitled to navy bills in 1711, deposits them with Sir *Stephen Evans*, who gave a note to be accountable for them, and in six months afterwards becomes bankrupt. The representative of *A.* petitions to be admitted before the Master to prove both principal and interest to the time of the decree, as navy bills in their nature carry interest. As this is a special deposit, a calculation shall be made of the value of the whole intire thing deposited, both principal and interest at the time of the deposit, and interest not to run on as in a simple debt.

A Petition on the behalf of the representative of a person who was intitled to navy bills to the amount of 6000 *l.* and who had in the year 1711 deposited them in the hands of Sir *Stephen Evans* and his partner *Hale*, who gave a note specifying them, and promising to be accountable. In six months after Sir *Stephen Evans* becomes a bankrupt.

The application now was, that the petitioner be admitted before the Master, to whom the cause stands referred between the assignees and representatives of Sir *Stephen Evans*, to prove both the principal and interest to the time of the decree, as navy bills in their nature carry interest.

When the petitioner appeared before the commissioners of bankruptcy, they set a value upon the navy bills, according to the market-price they bore at the day of the deposit, which was only 4200 *l.* because there was a large discount, as there was no publick fund appropriated for the payment of them.

Lord

Lord Chancellor: I cannot allow the petitioner to come in as a creditor before the Master for the *interest* upon the navy bills as well as the principal, because there is a plain distinction between debts that carry interest and a special deposit of goods and stock; for in the former the interest shall be continued down to the date of the commission (1); but in the latter 'tis otherwise, for the interest stops from the time of the deposit, and a calculation shall be made of the value of the whole entire thing deposited, both principal and interest, be it stock or goods, according to the market price at the time of the deposit, and interest not allowed to run on as in the case of a simple debt. BROMLEY *v.* CHILD.

The petition dismissed.

(1) See *Bromeley* v. *Goodere*, *ante* 79. *Ex parte Bennett*, post. 2 vol. 528.

(C cc) *Rule as to Relation under Commissions of Bankruptcy.* [260]

Barwell and Others, Plaintiffs. *March* 5th, 1744.
Ward and Others, Defendants.

Case 140. Where the act of bankruptcy is lying in gaol for two months, a person shall be deemed a bankrupt from the first day of his surrender to prison by relation, so as to over-reach all intermediate transactions.

THE defendant's brother conveyed the moiety of a reversionary estate for less than half the value to her, and in a month afterwards surrenders himself to prison, and during his lying there, before the two months were expired, he turns his book debts into notes, and indorses over one from Sir *Roger Burgoyne*, and another from Sir *Francis Shipworth* to *Barbara and Margaret Ward*.

A commission of bankruptcy was afterwards taken out against *Ward*, and the plaintiffs were chosen assignees, who have brought this bill to set aside the conveyance, and pray that the plaintiffs, and the other creditors may have the benefit of the said estate, and that the deeds relating thereto may be delivered to them, and that the said notes and securities may be also delivered to them, and that they may have a satisfaction from such of the defendants to whom the same were indorsed, assigned, or delivered.

The counsel for the plaintiffs insisted, that the conveying lands for half the value is an act of bankruptcy of itself, and that the sister of the bankrupt ought to be directed to convey the same to the assignees, and that the notes being transactions during the intermediate time between his imprisonment and the lying there *two months*, that when the *two months* were compleat, he shall be deemed a bankrupt from the first day of his surrender to prison by relation, so as to over-reach all intermediate transactions.

On the part of the defendants it was urged, that the several deeds, and the indorsement of the notes, were previous to *Ward's* bankruptcy, and that the bankrupt being indebted to the defendant *Martha Doughty* in 450*l.* on bond, did, in *September* 1741, execute a warrant of attorney to confess judgment for the said debt, and that being also indebted to his sister *Bar-*

[illegible] v. WARD.

bara Ward in 60*l.* he did, by indentures bearing date in *September* 1741, convey to her and her heirs his reversionary interest of the said premisses, who did then deliver up a bond, which had been given her for 150*l.* to be cancelled, of which debt 60*l.* remained due, and the deeds were executed a few days after they bore date, but before *Ward* had committed any act of bankruptcy.

Lord Chancellor: The present is a plain case, and appears to be a fraudulent conveyance to cover the estate, for the deeds are executed at a time when *Ward* was in declining circumstances, having in the *October* following surrendered himself in discharge of his bail, and was confined in prison.

[261] No more than 60*l.* paid for the moiety of an estate in reversion, of the value of 39*l.* a year, which is pretended now to be redeemable on payment of 60*l.* but no clause of this kind in the deed itself, for it is an absolute bargain and sale.

The court in this case ought to do no more than to let the deed stand only as a security for the money really and *bona fide* advanced.

It is not disputed but that Mr. *Ward* was a bankrupt at the end of the *two months*, and that the act of parliament by relation makes him so at the time he indorsed the two notes; but it has been said by the defendant's counsel, the assignees might have brought an action of trover, but it would have been very difficult to have described the notes at law properly, and therefore the plaintiff is right to come here for a discovery.

It has been also said, the bankrupt indorsed the notes to raise a sum of money to put out his apprentice to another master, for the rest of his time.

The most equitable method is to allow him a gross sum out of the bankrupt's effects, and commissioners of late years have recommended it to creditors to allow it, and in my opinion very rightly, for it would be hard to make him come in as a creditor under the commission (1).

His Lordship declared that the lease and release of September, 1741, *ought to be set aside as an absolute conveyance, and to stand only as a security for what (if any) was really due from* Ward *the bankrupt to defendant* Barbara Ward *upon the bond, and referred it to a Master to inquire whether at the execution of the said deeds any such bond was subsisting, and what money was* bona fide *due from the bankrupt to* Barbara *thereon, and if no money due at that time, that* Barbara *should then convey the said premisses to the plaintiffs in trust for the creditors.*

His Lordship also declared, that the assignment of the two notes, being after Mr. *Ward* was in point of law a bankrupt, is void, and directed the Master to see if the notes are in the hands of *Martha Doughty*, or in whose hands, and whether she hath received any money thereon, and to inquire what she paid in consideration of the said notes, and whether the same was applied to procure another master to the apprentice, and if so, how

(1) See *Ex parte Sandby, ante* 149.

much

much was proper to be allowed (according to the usual course of proceedings under commissions) for turning over the apprentice of a bankrupt to another master, and so much to be allowed to *Martha Doughty*, and the surplus she is to pay over to the assignees, and deliver up the said notes, and decreed the defendant *Barbara Ward* to pay costs, so far as relates to the conveyance to her, to this time (1). BARWELL v. WARD.

(1) Reg. Lib. A. 1744. f. 233. *Tibe* v. *Webber*, *Davies* B. Laws, 376. *King* Assignee of *Langman* v. *Leith*, 2 *Durn.* & *East*, 141.

(Ddd) *Rule as to an Extent of the Crown.* [262]

Ex parte Marshall and Others; in the Matter of *Garway's* Bankruptcy. *March* the 28th, 1751.

HATTON was surety in a bond with *Garway* to answer particular debts; *Garway* becomes a bankrupt, and an extent of the crown is taken out against *Hatton*, who pays the debt after disputing it for some time, and is put to an expence thereby.

Case 141. Part of S. C. ante 126, 131. not S. P. An extent of the crown is taken out against a surety of a bankrupt who pays the debt, after disputing it some time, and being put to an expence thereby. He shall, notwithstanding he disputed the payment of a just debt, be admitted to prove the expences of such suit under the commission against the principal.

Hatton is since dead, and his representatives apply now to be admitted creditors under *Garway's* commission, and to prove the expences he was put to in the dispute with the crown; the counsel for the assignees opposed it, and insisted that notwithstanding as between debtor and creditor, the latter is intitled to have compleat satisfaction against the surety as well as the principal; there is no rule, that if a surety disputes a just debt, and occasions an expence by that means, that he shall charge the estate of the principal with the expences of such a suit.

Lord Chancellor: I know of no such distinction, and it would be a very hard case here, as the failing of *Garway* was in all probability the sole occasion of the difficulties that *Hatton* was under, and made him incapable of paying the demand of the crown; and as an extent is both an action and execution in the first instance, *Hatton*, in his situation, could not be supposed prepared to pay it immediately, and therefore no pretence to say his representatives shall be precluded from proving the expences *Hatton* was to put in the suit with the crown.

An extent of the crown is an action and execution in the first instance.

Anon'.

October the 26th, 1745.

A Petition on behalf of a bankrupt to be discharged from a commitment under an extent of the crown, having surrendered himself to the commissioners, and conformed himself according to the acts of parliament relating to bankrupts.

Case 142. A bankrupt, though he has conformed in every respect to the acts relating to bankruptcy, cannot be discharged from a commitment under an extent of the crown.

Lord

Anon'. *Lord Chancellor*: The crown is not within the statutes of bankrupts, and therefore he cannot be discharged from a commitment on behalf of the crown.

[263] (Eee) *Rule as to Creditors assenting or dissenting to a Certificate.*

August the 14th, 1742.

Ex parte Turner.

Vide under the Division, Joint and Separate Commission.

Ex parte Lindsey.

October the 26th, 1745.

Vide under the Division, What is, or is not, an Election to abide under a Commission.

Ex party Williamson.

March the 25th, 1750.

Vide under the Division, Rule as to a Certificate.

In the Matter of the *Simpson*'s Bankruptcy.

December the 21st, 1752.

Vide under the Division, Rule as to Partnership.

(F f f) *Bankruptcy no Abatement.*

Anon'.

November the 29th, 1748.

Case 143.

An order for dissolving an injunction *nisi* will be made absolute, notwithstanding the plaintiff is a bankrupt, unless he shews cause.

MR. *Wilbraham*, where the defendant had an order for dissolving the injunction *nisi*, moved it might be made absolute, unless cause shewn before the rising of the court.

Mr. *Sewell* of the other side said, the cause was abated by the plaintiff's having become a bankrupt since the granting of the injunction, and that the assignees under the commission have not as yet revived.

Lord Chancellor: Bankruptcy is no abatement (1), and therefore if he had any cause to shew he must go on, or he would dissolve

(1) *Bramhall* v. *Cross*, *Exchq. Hill. Term*, 1790. This was a motion to dismiss the bill with costs for want of prosecution unless cause. The cause shewn was the bankruptcy of the plaintiff after the bill [illegible], and before the bill became dis[illegible]le. The case of *Tait* v. *Carwick*, [illegible] *June* 1786, was cited, wherein [illegible] had been dismissed (*but without* [illegible]) for want of prosecution notwithstanding the bankruptcy. The Lord Chief Baron thought, that the circumstances of this case were such as to entitle the plaintiff to no favour; and the bill was dismissed *with costs*. In *Sellas* v. [illegible], *Chan. December the 8th*, 1790, a motion was made to discharge an order for dismissing the bill, which was filed in 1788. The answer was put in in *February* 1789. The sole plaintiff became a bankrupt in *March* 1789. In *December* 1789 the defendant without notice to the assignees of the bankrupt obtained an order to dismiss the bill for want of prosecution with costs. The plaintiff gave notice of a motion to discharge the order of dismission for irregularity. The defendant's solicitor undertook in writing not to proceed on the order of dismission, and offered to pay the costs, but he did not pay them. Now notice was given by the plaintiff to discharge the first order;

solve the injunction: Upon which he shewed exceptions for cause, which were allowed upon the common terms of procuring the Master's report in four days. ANON'.

der; it being at present a bar to the assignees continuing the suit by supplemental bill. The cases of *Tait* v. *Carwick* and *Bramhall* v. *Cross* were cited. Lord *Thurlow* at first doubted whether he could discharge the order: but the application to have the order of dismissal discharged was renewed the 14th of *January* 1791, when his Lordship said, he could not make an order dismissing the former order, because that would acknowledge, that there could be an order made after bankruptcy and when the suit, as he conceived, was abated. He thought it was abated, by analogy to abatement at law, which always takes place on a bankruptcy before judgment either final or interlocutory; and so it was in the case of *Monk* v. *Morris*, 1 Mod. 93, and *Waugh* v. *Aylen*, 3 Term Rep. 437. He said, that notwithstanding the Exchequer practice, this was an order improper to have been made, and improper to be noticed now: that it was a mere nullity, and that the bankruptcy before judgment or decree was equally an abatement in equity, as well as at law: *that the case in Atkyns 263, where Lord* Hardwicke *was reported to say, it was no abatement, was ill reported; for the order, which had been examined, did not warrant the report*: that the assignees should now file their supplemental bill, which would take up the proceeding from the very date of the bankruptcy, and so call out this intermediate order totally. His Lordship admitted, that this was not a strict bill of revivor, nor even of supplement, but an original bill in nature of a supplemental bill: and that there must be a decree in the supplemental suit itself; but still he thought, that the original suit was gone by the bankruptcy here as at law, and yet that such new suit by the assignees might take nevertheless the benefit of the former suit. He therefore refused the motion to discharge the order for dismissing the original bill for want of prosecution. *Davidson* v. *Butler, in the Exchequer the 28th of April* 1793. A motion was made to dismiss the bill for want of prosecution unless cause. Mr. *Cooke* now shewed for cause, that the bill was filed for an injunction against the defendant's proceeding at law upon certain notes, which were in the defendant's possession and drawn by one *Baker* as the co-partner of the plaintiff, after the dissolution of the co-partnership for a subsequent debt, and at a time the defendant knew the copartnership was dissolved; and that the plaintiff became a bankrupt since the filing the bill: he therefore insisted, 1st, that the suit was absolutely abated, and therefore not liable to be dismissed, for which he cited the case of *Sellas* v. *Dawson*: 2dly, that if the bill should be dismissed, yet that it ought not to be with costs. *Tait* v. *Carwick*, *June* 27th 1786. Mr. *Abbot contra* said, that there were cases in the Exchequer, where the bill had been dismissed, *viz.* *Tait* v. *Carwick*, and *Bramhall* v. *Cross*. The Lord Chief Baron said, it was the clear established practice of that court *not to consider Bankruptcy as an abatement*: that the only difficulty arose from the case in Chancery; but as that case did not appear to have been so fully debated on authorities, they thought it ought not to prevail. He said, that equity should follow the practice of the courts of law in this respect; and that in reason the mere bankruptcy of the plaintiff ought not to prevent the defendant from being reimbursed, if he can, for the expence of the suit. *Hotham* Baron, and *Thompson* Baron, concurred, and the bill was ordered to be dismissed with costs. See also *Lingard* v. *Wegg*, 3 Bro. Cha. Rep. 435.

(Ggg) *Arrest upon a Sunday for a Contempt regular.*

Ex parte Whitchurch. *June the 2d, 1749.*

Vide Title *Arrest*, *under the Division*, *Where good on a Sunday.*

CAP. XVI.

Baron and Feme.

(A) *How far the Husband shall be bound by the Wife's Acts before Marriage.*

(B) *How far a Feme Covert shall be bound by the Acts in which she has joined with her Husband.*

(C) *Concerning the Wife's Pin-money and Paraphernalia.*

(D) *How far Gifts between Husband and Wife will be supported.*

(E) *Concerning Alimony and Separate Maintenance.*

(F) *Rule as to a Possibility of the Wife.*

[265] (A) *How far the Husband shall be bound by the Wife's Acts before Marriage.*

March the 2d, 1737.

Samuel Newstead, *Stokes* and *Susannah* his Wife, *Atkinson* and *Elizabeth* his Wife, and others, } Plaintiffs.

Samuel Searles, *Miller* and *Balls*, and others, — Defendants.

Case 144.

A widow who had two children by a former husband and no provision made for them, and these two children each of them a child, and being in possession, in her own right, of freehold, copyhold, and leasehold estates, by articles before her second marriage, to which her husband was a party, and by his consent, conveys the whole to trustees, that they should divide the freehold, copyhold, and leasehold, if no issue of the marriage, in moieties, one to the plaintiff her grandson, his heirs and assigns, the other to her grandaughter in fee, provided if there should be any child or children of the marriage, that child or children to have an equal share of the said estates, with the grandson and grandaughter.

The husband and wife afterwards mortgage the settled estates, to persons who had notice of the settlement.

Declared, that the settlement is no voluntary agreement, but a binding one, and no instance where such a limitation has been held fraudulent, and void against subsequent purchasers, or creditors; for if it should, no widow, on her second marriage, would be able to make any certain provision for the issue of a former.

THE plaintiff *Newstead* is the eldest son and heir of *Elizabeth*, late the wife of *Newstead* senior, who was the eldest daughter and coheir of *Elizabeth Searles* deceased, by *John Martyn* her former husband, and the plaintiff *Susannah* is the youngest daughter, and another of the coheirs of *Elizabeth Searles* deceased, by *John Martyn*, and the plaintiff *Elizabeth* the wife of *Joseph Atkinson*, is the daughter of *Susannah Stokes*, and grandchild of *Elizabeth Searles*.

Mr. *Cornwallis* seised in fee of freehold and copyhold, and possessed of leasehold, held of the bishop of *Norwich* in *Suffolk*, of the yearly value of 150 *l.* made his will in 1698, having first surrendered his copyhold estate to the use of his will, and thereby gave to *Grace* his wife all his freehold, copyhold, and leasehold, for so long as she should continue his widow, and after her decease, then he gave the freehold, copyhold, and leasehold estates,

eſtates, to *Elizabeth Searles*, then *Elizabeth Martyn* his daughter, and her heirs; the teſtator died ſoon after. NEWSTEAD *v.* SEARLES.

Elizabeth Searles, before her marriage with the defendant *Samuel Searles*, *by indenture dated the* 30*th of* April, 1709, between her of the firſt part, *Samuel Searles* of the ſecond part, *Smith* and *Maltyward* of the third part, reciting the will of Mr. *Cornwallis*, and that a marriage was intended between *Elizabeth* and *Samuel*; and that it was agreed *Elizabeth* ſhould have the diſpoſition of her eſtates after the death of *Grace*; *Elizabeth* with the conſent of *Samuel* for the ſettlement of her eſtate upon ſuch children, and grandchildren, as *Elizabeth* ſhould have living, either by her late huſband *John Martyn*, or by *Samuel Searles* at the time of her death, did covenant with *Smith* and *Maltyward*, that they and their heirs ſhould after the intended marriage, and the death of *Grace*, ſtand ſeiſed of the meſſuage held by leaſe of the biſhop of *Norwich*, and all other the ſaid eſtates of *John Cornwallis*, given by his will to *Elizabeth Searles* after *Grace*'s deceaſe, to the uſes therein and after mentioned, that is to ſay, when the freehold and copyhold lands ſhould come to be veſted in *Elizabeth*, to permit *Samuel Searles* to receive to his own uſe, during the coverture, the rents and profits thereof, and if *Elizabeth* ſurvived *Samuel*, then ſhe to receive them during her life, with a power to *Elizabeth* to charge the ſaid eſtates by her will, or any other writing, with 200*l.* to be paid after her deceaſe, as ſhe ſhould appoint, *and for want of ſuch appointment*, to be paid to *Samuel*, and after the deaths of *Grace* and *Elizabeth*, that the truſtees and their heirs *ſhould divide the freehold, copyhold, and leaſehold eſtates in manner following*, (*that is to ſay,*) *if no iſſue between* Samuel *and* Elizabeth *living at her deceaſe, that then they ſhould convey one moiety of the ſaid premiſes to the uſe of the plaintiff* Newſtead, *his heirs and aſſigns, and the other moiety to the uſe of the plaintiff* Suſannah Stokes *her daughter for life, remainder to her grandaughter the plaintiff* Elizabeth Atkinſon, *her heirs and aſſigns*; *provided, if there ſhould be any child or children between* Samuel *and* Elizabeth, *that then each ſuch child to have an equal ſhare of the ſaid eſtate, with the plaintiff* Newſtead *and* Elizabeth Atkinſon. [266]

The marriage took effect, and the defendant *Searles* entred upon the freehold, copyhold, and leaſehold lands, and received the rents thereof, upon the death of *Grace*, which happened in 1719, and enjoyed the ſame unto the death of *Elizabeth*, which happened in *September* 1733, without leaving any iſſue by the defendant *Searles*; the plaintiff on the death of *Elizabeth*, became intitled to the ſaid moiety under the ſettlement, and *Suſannah Stokes* to the other for life, with remainder to *Elizabeth Atkinſon* and her heirs, and inſiſt the ſame ought to be conveyed accordingly, and that the deed of the 30th of *April*, 1709, ought to be carried into execution; and therefore by their bill pray an account of the rents, &c. received from the freehold, copyhold, and leaſehold eſtates, ſince the death of *Elizabeth Searles*, and that one moiety of the reſidue of the profits may be paid to the plain-

NEWSTEAD v. SEARLES. tiff *Newstead*, the other to the plaintiff *Stokes*, and *Susannah* his wife, and that the legal estate of the said freehold, copyhold, and leasehold estates may be granted, surrendred, and conveyed to such of the plaintiffs as are intitled to the same, according to the settlement of the 30th of *April*, 1709.

The defendant *Searles* in 1719, together with *Elizabeth* his wife mortgaged the freehold estate for a term of years, for 200 *l.* to *Pindar*, and the leasehold estate was afterwards assigned to him, as a further security, and *Searles* and his wife levied at that time, and afterwards, fines, whereby the freehold and leasehold became vested in *Searles* in fee, after *Elizabeth*'s death, subject to the mortgage.

Searles insisted that he was intitled to the equity of redemption, and that his wife executed such deeds and fines out of [267] affection to him, and also that *Elizabeth* dying without appointing the two hundred pounds under the deed of the 30th of *April*, he ought to have it paid to him.

The defendant *Miller* claims as assignee of *Pindar*'s mortgage term, which after several mesne assignments became vested in him the 26th of *March*, 1733, at which time he advanced a further sum to *Searles* and his wife, and that there is now due to him for principal 1310 *l.* besides interest, and says that he never had any notice, till after the death of *Elizabeth Searles*, of the plaintiff's claim, nor of the indenture of the 30th of *April*, 1709.

Lord Chancellor: The question is, Whether the articles of the 30th of *April*, 1709, are for a valuable consideration and binding, or ought to be considered as voluntary and fraudulent, with respect to subsequent creditors or purchasers?

If I was to lay it down as a rule that such articles as these are not binding, it would become impossible for a widow on her second marriage to make any certain provision for the issue of a former, and the second husband might then contrive to defeat the provision made for those children (1).

I am of opinion these articles ought not to be considered as a voluntary agreement, and that the plaintiffs are intitled to relief in this court. This is the case of a widow, who has two children by a former husband, and no provision made for them, and those two children have each of them a child, and the mother being in possession in her own right of freehold estate, leasehold, and copyhold, the second husband, if there had been a child born alive, would have been intitled to be tenant by the curtesy of the freehold, and also to the leasehold and copyhold immediately upon the marriage.

To prevent this, by the articles before the second marriage, 200 *l.* is allowed to be raised by the wife out of the estate, and in case there should be no children of the second marriage, then one moiety thereof was to go the plaintiff *Newstead* his heirs and assigns, and the other to *Susannah Stokes* for life, remainder to *Eli-*

(1) *Vide Cotton* v. *King*, 2 *P. W.* 358. 674. *Countess of Strathmore* v. *Bowes*, 2 *Bro. Cha. Rep.* 345.

zabeth

zabeth Atkinson, her heirs and assigns, the former her grandson by the first marriage, and the latter her daughter and grandaughter; but if there should be any child or children of the second marriage, then they were to have an equal share with the plaintiffs.

Upon the mortgage to *Pindar*, by the contrivance of some country attorney, *Elizabeth Searles* and her husband levied a fine, and in the deed to lead the uses there is a compleat recital of the will, under which the wife claimed, and of her marriage settlement in so ample a manner, that the will and settlement must necessarily have been laid before him, and he must consequently have had full notice of it as agent for the mortgagee.

The children of the first marriage stand in the very same plight and condition as the issue would have done, if there had been any of the second marriage, and even are provided for before them.

Suppofing there had been issue of the second marriage, and they had brought their bill to carry these articles into execution, upon a decree in their favour, would not the children by the first marriage have been equally intitled to a benefit from the decree? [268]

Taking the case with all its circumstances, I think the settlement no voluntary agreement, but a binding one; the statutes of the 13 and 27 *Eliz.* that make conveyances fraudulent, are voluntary conveyances, made against purchasers upon a valuable consideration, or *bonâ fide* creditors: but it would be difficult to shew that such a limitation, as in the present case, has been held fraudulent, and void against subsequent purchasers or creditors * (1).

The present is a stronger case, for here are reciprocal considerations both on the part of the husband and wife, by the provision under the articles for the children of the second marriage.

* "*Jenkins* v. *Keymis*, 1 *Lev.* 150. & 237. there Sir *Nicholas Keymis*, being tenant for life, remainder to his son *Charles* in tail, in 1641, in consideration of a marriage to be had between his son and *Blanch Mansell*, and 2500*l.* portion, levied a fine to the use of Sir *Nicholas Keymis* for life, remainder to *Charles* and *Blanch* for their lives, remainder to the heirs of the body of *Charles* of *Blanch* begotten, remainder to the heirs of the body of *Charles*, with power to Sir *Nicholas Keymis* to charge the premisses with 2000*l.* Sir *Nicholas* and *Charles* in 1642, joined in a lease and release to *David Jenkins* and his heirs for 2000*l.* on condition of payment of 2000*l.* with interest some years after, to be void, *Blanch* afterwards dies without issue, *Charles Keymis* marries another wife, by whom he had issue the defendant, and dies, the mortgagee dies, and his heir brought an ejectment, and adjudged the lease and release was no good execution of the power at common law. He then brought his bill in equity on these grounds; *1st*, that the consideration of the marriage of *Blanch* and the 2500*l.* paid with her, did not extend to the defendant, being an issue by the second *venter*, and so the estate in remainder whereby he claimed was voluntary; (two other grounds not material to this case) but on the first Lord Keeper *Bridgman* declared that the consideration of 2500*l.* paid on the first marriage, should extend to the issue by the second *venter*."

Hardr. 395. Ch. Cas. 103. Ch. Rep. 279. Gilb. see Prac. 303.

(1) See *ante Walker* v. *Burrows* 94. *Doe ex dem. Watson* v. *Routledge*, *Cowp.* 705.

The

NEWSTEAD v. SEARLES.

The mortgagees had notice that the lands were liable to these articles, and therefore the plaintiffs are intitled to have the benefit of them against the defendants who are affected by notice; and his Lordship decreed an account to be taken of what is due for the principal sum of 200*l.* and interest, from the death of *Elizabeth* the late wife of defendant *Searles*, and to tax *Miller* his costs so far as relates to the mortgage of 200*l.* and upon being paid what shall be reported due, ordered the defendants *Miller* and *Searles* to convey the freehold, and to assign the leasehold, and surrender the copyhold free of all incumbrances done by them, to the plaintiff *Newstead*, *Susannah* the wife of *Stokes*, and *Elizabeth* the wife of *Atkinson*, according to the several estates and interests therein provided and limited to them by the said marriage articles (1).

(1) Reg. Lib. B. 1737. fo. 478.

[269] (B) *How far a Feme Covert shall be bound by the Acts in which she has joined with her Husband.*

June the 18th, 1737.

Metcalf v. *Ives.*

Vide Title *Award and Arbitrament, under the Division, For what Causes set aside.*

(C) *Concerning the Wife's Pin-money and Paraphernalia.*

March the 25th, 1738.

Ridout v. *Lewis.*

Case 145. S. C. post. 2 vol. [illegible] — *A.* had 300*l.* *per ann.* pin-money, the husband for several years before his death paid her 200*l.* only, but promised her she should have the whole at last.

MRS. *Lewis* had three hundred pounds *per annum* settled on her for pin-money; for several years before Mr. *Lewis*'s death he paid her only two hundred pounds *per annum*, and there was evidence read, that often, on Mrs. *Lewis*'s complaining of being paid short, Mr. *Lewis* told her she would have it at last.

The question was, Whether she should be let in to have the arrears of her pin-money, made a charge on the assets of Mr. *Lewis*.

If the wife accepts less, or lets her husband receive what she has a right to receive to her separate use, it implies a consent in her to submit to such a method. But where the pin-money is paid to her *de anno in annum*, her agreement with the husband relating to her separate estate amounts not to a new agreement, and his promising she should have it at last is an undertaking to pay the arrears.

Lord Chancellor: I allow that it is a general rule, when a wife accepts a payment short of what she is intitled to, or lets the husband receive what she has a right to receive to her separate use, it implies a consent in the wife to submit to such a method, where the husband and wife have cohabited together for any time after; but here is no pretence that the pin-money was departed

parted from by the wife, for there is evidence of several payments *eo nomine*; and though a wife may come to an agreement with her husband in relation to any thing she is intitled to separately, yet this does not amount to a new agreement, for here was a promise she should have it at last, which was an undertaking to pay the arrears; she is therefore intitled to have the arrears of her pin-money raised by the trustees out of the estate, which was by settlement charged with it. Ridout v. Lewis.

His Lordship therefore decreed, that an account should be taken of the arrears of the three hundred pounds a year due to the defendant, and what shall be found owing on the balance of that account was to be considered as a charge on the term of 500 years created by the marriage settlement, for securing the payment of the three hundred pounds a year (1).

(1) Reg. Lib. B. 1740 fol. 35. See *Countess of Warwick* v. *Edwards*, 1 Eq. Ab. 14[illegible]. pl. 7. But in general a wife is only allowed to come in as a creditor for one [illegible]'s arrear of pin-money. 1 *Ves.* 267. 2 *Ves.* 7. 190. See also *Offley* v. *Offley*, *Pre. Cha.* 26. *Powell* v. *Hankey*, 2 *P. W.* 82. *Thomas* v. *Bennet*, ibid. 341.

(D. [illegible] *Gift between Husband and Wife will be supported.* [270]

Sar[illegible] only Child of *John Lucas*, by *Mary* [illegible],	Plaintiff.	*July* the 12th, 1738.
Isabe[illegible] widow of the said *John Lucas*, and [illegible] an Infant, their Child,	Defendants.	

Case 146.

MARY [illegible] in her last illness, requested of *John Lucas* [illegible] wearing apparel, gold watch, pearl necklace, [illegible] and several pieces of plate, coins, and other [illegible] her possession, and used by her, might be given to [illegible] the hands of Mrs. *Dunster* (a friend) [illegible] use; which *John Lucas* promised, and after her death [illegible] said things to the plaintiff, and made an inventory [illegible] of the same, to the amount of 187*l.* 8*s.* 6*d.* and locked them in a strong chest, and after making three copies of the inventory, put one into the chest, and gave the key with another copy to Mrs. *Dunster*, and the third to *James Lucas* his brother, to the intent it might be known what was given: in the presence of several persons he sent the chest, with the things therein, to Mrs. *Dunster*, for the plaintiff's use, and she accepted the same on the plaintiff's behalf.

Mary Lucas in her last illness requested of her husband that her wearing apparel, gold watch, pearl necklace, rings, &c. in her possession, and used by her, might be given to her daughter, and put into a friend's hands for her daughter's use, which the husband promised, and, after his wife's death, gave the said things to his daughter, and made an inventory, and locked them in a strong chest, and gave the key to his wife's friend, and sent the things therein to her for his daughter's use. Tho' the husband afterwards took some of the things into his possession again, that is not sufficient to invalidate the gift which was perfect by the former act.

John Lucas, after his first wife's death, by articles of the 26th of *June*, 1734, between him of the first part, and *Holmes* and defendant *Isabella* of the second part, reciting an intended marriage between

Lucas v. [illegible]

between him and *Isabella*, and that *Holmes* had agreed to pay him 2000*l*. and that he had a daughter (the plaintiff) by a former wife; the said *Lucas* agrees that if he should die in the life-time of *Isabella*, and there should be any child between them, or that the plaintiff should be then living, that then *Isabella* should enjoy one third of his personal estate, after payment of his debts and funeral expences, and her widow's chamber, according to the antient custom of *London*; and that the children of such marriage, together with the plaintiff, if living, should enjoy one third of his personal estate for their respective use, and that the provision made for *Isabella* was in full of her dower and thirds.

John Lucas in 1736 died, leaving *Isabella* his wife, and one only child by her, *Isabella* the infant, and also his daughter the plaintiff, and by his will of the 10th of *June*, 1736, directed that the surplus of his estate and effects, after his marriage contract was duly provided for, and all his personal estate, should be divided between his wife and daughters, the plaintiff, and *Isabella* the infant.

The defendant *Isabella* the widow, insists on 1000*l*. *South-sea* annuities, which the testator in his life-time transferred to her, and as she says intended thereby to give them to her, and by word of mouth declared that she should hold and enjoy them to her own use, and before the transfer promised often to transfer them to her own use, and gave instructions to an attorney to draw a deed to declare them to her own use, who accordingly vested it in trustees, in trust that they should transfer the same to defendant for her own use, but that testator (on information that it would be better) transferred them to the defendant, and assured her that such transfer would effectually secure them to her and which he did as a further provision, and to make it equal to her fortune.

[271]

And as to the watch, pearl necklace, and other things claimed by the plaintiff, insists that the testator voluntarily, and of his own accord, sent for the chest, and disposed and altered the things therein, as he thought fit, and that he made her a present of the snuff-box, and a pearl necklace out of the chest.

The bill prayed a delivery of the chest, and the things therein contained, and a distribution of the estate according to the marriage articles, and the will of the testator *John Lucas*.

Lord Chancellor: As to the first part of the bill, I am of opinion that the delivery by *John Lucas* of the things in a chest to Mrs. *Dunster* for the use of his daughter, who was the child left by the first wife, according, as he said, to the promise made to his wife in her life-time, is a sufficient delivery, to vest the property in the daughter, and though he did afterwards take some of the things into his possession again, as the watch and necklace, that was not sufficient to invalidate the gift, which was made perfect by the former act.

[illegible] between a [illegible]nd and wife [illegible] be support- [illegible] this court, [illegible] law does [illegible] allow the [illegible] to pass.

As to the transfer by *John Lucas* of 1000*l*. *South-sea* annuities to his wife in her own name, I am of opinion this is not a good transfer, so as to affect the marriage articles, by making any alteration in the gross estate of the testator, the whole of which

which was liable by the marriage articles to be divided into such proportions, which he could not voluntarily alter; and therefore this is as much a fraud on the articles, as it would be on the custom of the city of *London*, yet it is good as against the testator himself, and to be answered out of his testamentary share, if sufficient; and in this court, gifts between husband and wife have often been supported (1), though the law does not allow the property to pass (2); it was so determined in the case of Mrs. *Hungerford* and in Lady *Cowper*'s case, before Sir *Joseph Jekyll*, where gifts from Lord *Cowper* in his life-time were supported, and reckoned by this court, as part of the personal estate of Lady *Cowper*. LUCAS *v.* LUCAS.

"His Lordship declared that the jewels and other things "given by the testator to the plaintiff, and delivered in a chest "to Mrs. *Dunster*, for her benefit, are not to be considered "as any part of the testator's personal estate, and that what "should appear to be the clear personal estate, after payment "of debts, should be divided into three parts; one third to be "retained by defendant *Isabella* in her own right, by virtue of "her marriage articles; another third to be the testamentary "part of testator, and the remaining third is to be divided into [272] "moieties, one to belong to the plaintiff, the other to *Isabella* the "testator's daughter, by his second wife.

"And his Lordship declared, that the transfer of the 1000 *l.* "*South sea* annuities, by the testator to his wife, ought not to "take effect in prejudice of the marriage articles, but to be "brought into the personal estate before the division be made, "but that such transfer ought to be considered as a good gift "against the testator *John Lucas* himself, and that the defendant "*Isabella* the widow ought to receive a satisfaction for the 1000*l.* "*South-sea* annuities out of the testator's third or testamentary "part of his personal estate, so far as that will extend, and doth "therefore order that the testator's third part be applied in the "first place, to make good to the defendant *Isabella* the value of "the *South-sea* annuities, and the dividends thereof from the "death of the testator." The jewels, &c. his Lordship directed to be delivered to the defendant *James Lucas* for the benefit of the plaintiff (3).

(1) *Slanning* v. *Style*, 3 *P. W.* 338. *Moore* v. *Freeman*, *Bunb.* 205. *Bletsow* v. *Sawyer*, 1 *Vern.* 244. *Watkyns* v. *Watkyns*, *post.* 2 vol. 97. note 1.

(2) See *Moyle* v. *Gyles*, 2 *Vern.* 385. *Beard* v. *Beard*, post. 3 vol. 72.

(3) Reg. Lib. B. 1737. fol. 421. See *Graham* v. *Londonderry*, post. 3 vol. 393.

(E) *Concerning Alimony and Separate Maintenance.*

February the 27th, 1737.

Case 147.

A. before, and in consideration of a marriage and a portion with his intended wife, conveys lands to trustees, upon trust to pay 100*l.* *per ann.* to the Lady for her separate use. She many years after the marriage, upon disputes between her and her husband, leaves him and goes abroad. The trustees (there being great arrears of the annuity) bring an ejectment for recovery of the term, and the husband his bill for an injunction to stay the proceedings in ejectment.

Lord Chancellor was of opinion he could not relieve against the payment of the annuity, notwithstanding the husband by his bill offers to receive his wife again, and pay her the annuity, if she would live with him, but directed an account, and on payment of the arrears of the annuity, the injunction to be continued, or otherwise, dissolved; and if default in the growing payments, the wife to be at liberty to apply (1).

Moore v. *Moore*.

SIR *Richard Francis Moore* by settlement dated the 18th of *October* 1707, made before, and in consideration of the marriage to be had between the plaintiff and defendant, and of 6000*l.* her portion, conveyed lands to trustees for 99 years, upon trust to pay out of the rents 100*l.* a year, tax free, by half yearly payments, to Lady *Moore* for her separate use.

The marriage took effect, and after living above twenty years with great harmony, upon some differences and disputes arising between the husband and wife, she went privately from him in *January* 1728, and got into *France*, and now resides there; and having prevailed with her trustees to bring an ejectment for the recovery of the term, there being great arrears of the annuity due, they were proceeding to judgment and execution, when the husband thought proper to bring his bill in equity, complaining of his wife's withdrawing herself, and insisted that she is intitled to the annuity only during her cohabitation with him, and offers to pay the annuity if she would live with him, and to receive her kindly, and forgive what is past; and there-[273]fore prays that he may be relieved against the payment of the annuity, and may have an injunction to stay the proceedings in ejectment.

After the ejectment brought by the trustees, the husband commenced a suit in the ecclesiastical court, for a restitution of conjugal rights, and upon the wife's not appearing to the process of the court, a sentence of excommunication was pronounced against her.

For the plaintiff in this case, there were two points chiefly insisted upon.

First, That his wife by her misbehaviour, in causelesly deserting her family, had forfeited her pin money.

Secondly, That it was intended for her only to spend in her family.

(1) See *Sidney* v. *Sidney*, 3 P. W. 269. Eq. Ab. 439. pl. 37. *Blount* v. *Winter*, 3 *Cox's* P. W. 276. *Watkyns* v. *Watkyns*, *post.* 2 *vol.* 96.

Upon

Upon which it was argued, that by the marriage contract, she is obliged to cohabit, and that failing in this, she ought not to have her annuity, and that therefore it is equitable to restrain her till she returns, and lives with her husband, and behaves as she ought to do, and that he has no remedy to get her back but by stopping this pin-money. Moore v. Moore.

That this allowance was only to promote harmony between the plaintiff and the defendant, and to enable her to do acts of bounty in her family, therefore, when the reason for it ceases, the allowance ought to cease likewise.

That in many cases the court have interposed to make a provision for a wife, on the misbehaviour of the husband, *pari ratione* they ought to interpose, where the wife misbehaves, as in the case of *Colemore* v. *Colemore* (1), and *Oxenden* v. *Oxenden*, 2 *Vern.* 493. and that, in the present case, the Lady's deserting her family, in the manner she has done, is a sufficient reason for the court to interfere so far as to stop the payment of the pin-money, in order to induce her to return to her duty.

Mr. *Cox*, for the defendant, argued that these three considerations naturally arose upon this case.

First, Whether the settlement shall be taken strictly, or whether it shall be taken to intend a benefit to the defendant, on condition only of cohabitation.

Secondly, If to be construed conditionally only, then whether on cruel usage, she is not justifiable in separating from her husband.

Thirdly, Whether the usage here has been such as may justify her separation.

He argued, that according to the words and legal operation of the deed, there is a provision at all events for the defendant of 100*l*. a year, and *quoad hoc*, she is to be considered as a feme sole, and as a stranger to the plaintiff; and to take in other matters extrinsick, and not appearing from the words of the deed, would be judging of another deed, not of this. In the case of *Wills*, which generally allows the greatest scope, in order to let in the intent, the construction has always been bounded and circumscribed to the words, for the general rule has uniformly been, that [274] unless the intent can be collected from the words, it is in vain to urge it, for that otherwise it would be making a man's will, not construing it, and deeds are to be construed more strictly, and the rule of law is, that they are to be taken most strongly against the grantor, and most beneficially for the grantee (*a*). That *nemo contra factum suum venire potest*. 2 *Inst*. 66. but to come into the construction contended for on the part of the plaintiff, would be to invert both these rules.

(*a*) 5 Co 7. b. and Co. Lit. 183 a. and 197. a.

In *Astry* v. *Ballard*, 2 *Mod*. 193. it is said men's grants must be taken according to usual and common intendment, and where words may be satisfied, they shall not be strained further than they are generally used, for no violent construction shall be made to prejudice the right of any one, contrary to the plain meaning of the words.

(1) S. C. *post*. 3 vol. 296.

If

Moore v. Moore.

If the words then in the present case are to govern, they are so express and plain, that they leave no room for construction, and to put a meaning upon them, contrary to the plain sense, would be bringing things to the utmost incertainty. In *Edrick's* case (*a*) the judges said they would not make a construction against express words, and yet there was a strong equity in that case, to induce them to do it.

(a) 5 Co. 118. b.

If, in the present case, the defendant stood in need of the aid of this court, from any defect in her settlement, it might with some colour of reason be said, that she had forfeited her right to it by her elopement, but even in such a case, though it appeared that a wife had lived in open lewdness, yet she was not dismissed with such an answer; for in the case of *Mildmay* v. *Mildmay*, 1 *Vern.* 53. and 2 *Chan. Cas.* 102. the plaintiff a feme covert, who had 50*l.* *per ann.* settled on her by her husband, to be paid out of certain rents, suggested by her bill that he had, on purpose to defraud her of this annuity, procured the tenants to surrender their estates, on which the said rents were reserved, and prayed that it might be made good to her by decree of the court; and notwithstanding it appeared that she was a very lewd woman, and had eloped, the *Lord Chancellor* ordered, that the husband should stand in the place of the tenants, and admit the rent payable, and she to recover it at law as well as she could: there the settlement was merely voluntary, and after marriage, and the wife charged not only with elopement, but *open lewdness*, and yet it was thought reasonable to decree in her favour, and give her such relief, that without it she must have failed at law: In the present case, the settlement appears to be upon the highest considerations, that of marriage, and a large portion, and the utmost charged upon the Lady is a bare elopement; if therefore, in *Mildmay's* case, it was reasonable to aid her legal remedy, *a fortiori* it would be unreasonable in the present case, to restrain her from pursuing it.

As to the offer of the plaintiff to receive her, and on her return to pay the annuity, there are many cases, where such an offer, against the express contract of the party has been rejected,
[275] as in the case of *Seeling* v. *Crawley*, 2 *Vern.* 386. and numberless more to the same purpose: for if a man will with his eyes open make a bargain, that he after finds reason to repent of, he is not intitled to relief here, it is the effect of his own folly, and he must take the consequences.

It may besides be material to consider, what species or kind of offence it is that the defendant stands charged with; it is at most but a simple elopement, which is an offence not taken notice of, or any way punishable by the law of the land: by the Common law, a wife was intitled to dower, notwithstanding an elopement accompanied with adultery, and though by the statute of *Westminster* (*b*) adultery and elopement are made a bar to dower, yet it has always been taken so strictly, that the one without the other, has often been held to be not within the statute (*c*), certainly both together, tho' a bar to dower, would be no bar to her claiming a provision made for her by a jointure; and

(b) West. 2. ch. 34.

(c) Perk. pl. [illegible]5. [illegible] Abr. tit. Dower pl. [illegible]. Fitz. N.B. [illegible]. [illegible]

and though, in the ſpiritual court, the huſband may ſue her for reſtitution of conjugal rites, and for refuſal ſhe may fall under the cenſures of the church, yet that is not in reſpect of elopement, for ſuch a ſuit may be as well where there is a cohabitation, as otherwiſe. Moore v. Moore.

To ſay then, that in equity ſhe is puniſhable, or that ſhe might in this reſpect be deprived of any of her legal privileges, would be to ſet up an arbitrary legiſlative power in the court, to declare offences, and to puniſh them by no other meaſure than it's own diſcretion.

That a woman is juſtifiable in deſerting her huſband, where he uſes her with cruelty, cannot be diſputed; but then another queſtion will ariſe, whether the uſage which the defendant hath met with in the preſent caſe, be ſufficient to juſtify her conduct or not?

It appears evident from the proofs on both ſides, that there were continual quarrels between the plaintiff and the defendant about the pin-money, and they became ſo publick, that one witneſs ſwears, the plaintiff himſelf declared, his wife had been adviſed by a clergyman to go away from him, and many of the witneſſes fully prove, that the plaintiff diveſted her of all kind of management, and made her not only as a cypher in his family, but took from her even the reſpect due to her from his ſervants; whether this be ſuch uſage as may juſtify her conduct, muſt be ſubmitted.

It is obſerved by *Puffendorff*, in his book of the Law of Nature and Nations, in the chapter of Marriage, that in caſe a huſband denies his wife the reſpect due to her ſex, and her relation, ſo as to ſhew himſelf not ſo much a kind partner, as a troubleſome vexatious enemy, it ſhould ſeem very equitable, that ſhe might be relieved by divorce. *Barbeyrac* in his note (*d*) cites, to confirm this, the *Theodoſian Code*, *lib.* 5. *tit.* 17.

In the laws of our own country, there are hardly any footſteps to go by, or on which it may be ſaid with any certainty, what is cruelty in the huſband. In the caſe of the wife of one *Cloborne*, *Hetly* 149, it was ſo far held, that ſpitting in her face was cruelty in the huſband, that the court refuſed to grant a prohibition to the ſpiritual court, on a ſuit for a ſeparation, and alimony, founded on this cauſe, and ſaid by *Richardſon* chief juſtice, certainly the matter alledged is cruelty, for ſpitting in the face is puniſhable in the ſtar-chamber. [276]

Lord Chancellor: This is entirely a new caſe, and I do not remember any like it that hath ever yet come in queſtion. None have been cited, and I believe there are none; but it is not this, or any other difficulty in the caſe itſelf that makes it neceſſary for me particularly to ſpeak to it, but becauſe ſome things have been mooted of a much higher nature that require it.

The points to be conſidered are,

Firſt, Whether in any caſe this court ought to reſtrain a legal remedy, which a wife, or her truſtees have, to recover a ſeparate maintenance againſt the huſband?

Moore v. Moore.

Secondly, If from the evidence, in the present case, there be any reason to lay this restraint upon the defendant?

Upon the first it has been argued, that the defendant has causelesly deserted her family, and stood out contumaciously against the proceedings in the spiritual court.

Though this be a bill *primæ impressionis*, I should think there might be cases, where a husband would be intitled to come into this court, to restrain the trustees of his wife, by a decree here, from proceeding at law for her separate maintenance; and it would be reasonable to do this, especially when she elopes out of the jurisdiction of the ecclesiastical court, for that would be defeating their power, and there have I believe been cases where there has been a sentence for alimony in the spiritual court, in which this court have awarded *ne exeat regnums* in aid of the spiritual jurisdictions.

These separate maintenances are not to incourage a wife to leave her husband, whatever his behaviour may be; for, was this the construction, it would destroy the very end of the marriage contract, and be a public detriment.

If a wife should elope, be guilty of adultery, or a criminal conversation, or should leave her husband without any cause, and the ecclesiastical court can only punish her for contumacy, but she is intirely out of their reach as to any other punishment, I should think a husband right in his application to this court, to prevent her trustees from proceeding at law to recover her separate maintenance (1); but then the relief must arise from a very plain case, where there is a criminal conversation plainly proved, and plainly put in issue (2).

But this is not the present case, for here is no incontinence, and nothing but the bare elopement is put in issue; so that it will turn upon the second point, whether, upon the circumstances of this case, there be any reason to lay such a restraint upon the defendant?

Two things have been urged in behalf of the plaintiff.

First, That the wife has eloped without any cause.

Secondly, That she has been duly summoned in the ecclesiastical court, on the part of the plaintiff, for restitution of conjugal rights, and has continued in contumacy, and as she has been thereupon *excommunicated*, which is all the ecclesiastical court can do, as she is out of their jurisdiction, the husband cannot have any fruit from his suit there.

[277]

As to the first, I am afraid these separate provisions do often occasion the very evils they are intended to prevent, and if the plaintiff hath made his wife uneasy in respect of the pin-money, as there is great reason to believe he did, though this will not justify her going away, yet it may be an excuse, and possibly this agreement before marriage might be designed to provide for the wife, if such dissention should happen between the parties,

(1) See *Watkins* v. *Watkins*, *post*. 2 vol. 97. *Watkyns* v. *Watkyns*, *post*. 2 vol. 97 *Clarke* v. *Periam*, *ibid*. 337. *Lord* [illegible]

(2) See *Sydney* v. *Sydney*, 3 *P. W*. 276. *Lady Denerail's* case, *ibid*. 335. 338.

as would be a juſt inducement for them to ſeparate, though their quarrels ſhould be of ſuch a nature as are not proper to be laid before a court. Moore v. Moore.

As to the objection, that the plaintiff can have no effect from his eccleſiaſtical ſuit, I lay no great ſtreſs upon it, for it was not inſtituted in the ſpiritual court till eight years after her going away, and after the ejectment brought by the truſtees; and tho' the ſpiritual court only ſix citations upon the church door, or ſome other place, yet the huſband, who knew where ſhe was, might have given notice to her, or at leaſt to her attorney, who was employed in the ſuit at law. It has therefore the appearance of being commenced, in order to lay a better foundation for a ſuit here.

I do not find that the huſband has ever made any application to the wife, ſince ſhe ſeparated, to induce her to return, and therefore this caſe is diſtinguiſhable from *Whorwood* v. *Whorwood*, 1 *Ch. Ca.* 250. becauſe there the huſband, before the bill brought, offered to be reconciled, and deſired to cohabit with her, and uſe her as his wife; nor was there any ſeparate maintenance in that caſe on the contract of the parties.

There is another thing that has great weight with me, the huſband's paying the annuity ſince the ſeparation, for ſix months after the wife was gone from him; when ſhe petitioned the court for other money upon a different truſt, he, upon an application by a croſs petition to ſtop this, expreſsly ſays, that he had conſtantly paid her the annuity ever ſince ſhe left him, and offered to continue it: This is a ſtrong preſumption that he thought at leaſt ſhe was excuſable in ſeparating herſelf from him.

Theſe being the circumſtances of the caſe, I am of opinion there is not ſufficient foundation to give the plaintiff the general relief prayed by his bill, againſt the payment of the rent-charge of one hundred pounds a year, but that he is intitled to be relieved againſt the ejectment, on the terms hereafter mentioned; and therefore do in the firſt place direct the Maſter to ſee what is due to Lady *Moore* for the arrears of her annuity, and to tax her coſts at law, and upon the plaintiff's payment of what the Maſter ſhall certify to be due to the defendant for the arrears of her annuity, and the coſts at law, and continuing the growing payments of the ſaid annuity, according to the marriage ſettlement, the injunction to be continued; but in default of payment of the arrears of her annuity and coſts at law, then the injunction to be diſſolved, and the plaintiff's bill diſmiſſed with coſts to be taxed; and if the plaintiff ſhall make default in continuing the growing payments of the annuity, then Lady *Moore* is to be at liberty to apply to the court. And I do further order, that the plaintiff in a fortnight's time pay to the defendant's ſolicitor a hundred pounds, on account of the arrears of her annuity now due (1). [278]

(1) *Reg. Lib. B.* 1736. fol. 314.

Moore v. Moore.

N. B. Mr. Attorney General, after the decree was pronounced, said, this was so uncommon a case that probably it would never happen again.

Lord Chancellor replied, If you think so, you must have a very good opinion of the ladies; for

In amore hæc omnia insunt vitia, injuriæ,
Suspiciones, inimicitiæ, induciæ,
Bellum, pax rursum.

February the 17th, 1737.

Thomas Cecil, and *Mary* his Wife, and *Mary Juxon*, the Wife of *Emanuel Juxon*, by her next Friend, } Plaintiffs,

The said *Emanuel Juxon*, *Moses Juxon*, *Thomas Juxon*, and *Samuel Juxon*, } Defendants.

Case 148.

S. C. cited, 3 Burr. 1778.

The defendant *Emanuel Juxon* some few years after his marriage, left his wife and two small children, and went abroad and did not see her or them in fourteen years; the wife's mother during this time intrusted her with milinery and other goods, and permitted her to maintain herself and children out of the profits. The husband upon his return breaks open the wife's house, and takes away all her goods and produce of the stock so lent as aforesaid. The bill therefore (*inter alia*) brought for the re-delivery of the goods. What the wife has acquired in her husband's absence to subsist herself and family, is her separate property, and not liable to the disposition of the husband; and what he has forcibly taken, he must deliver in specie, but if disposed of, must pay her the value set by the Master.

IN 1708, the plaintiff *Mary Juxon*, then *Mary Eggington*, daughter of *Ann Eggington*, intermarried with the defendant *Emanuel Juxon*, and had issue a son and two daughters. One of the daughters died an infant, and the son in 1731, and the plaintiff *Mary Cecil* the other daughter in 1733 intermarried with the plaintiff *Thomas*. The defendant *Emanuel Juxon*, some few years after the marriage with *Mary Juxon*, left her and two small children, and went abroad and did not see or send to them for fourteen years; and upon their being so deserted, *Ann Egginton*, in 1714, intrusted the plaintiff *Mary Juxon* with a stock of goods, proper for the business of a milliner and broker, and permitted her to take the profits thereof to maintain herself and children. In 1720, *Ann Egginton* being of a great age, did by bill of sale, in consideration that her son *Richard Egginton* had undertaken to provide for her during her life, sell to him, his executors, &c. the goods, chattels, and personal estate therein mentioned, and desired him to be assisting to the plaintiff *Mary Juxon*, by lending her, as she had done, such of the goods as she should have occasion for, *to support herself and children*. And by another bill of sale in 1722, *Ann Egginton* conveyed to the plaintiff, *Mary Cecil*, the residue of her goods and chattels, houshold stuff, and all other her substance whatsoever, to her own proper use. *Ann Egginton* soon after died.

[279] In 1725, the plaintiff *Mary Juxon*, who had been constantly assisted by her daughter the plaintiff *Mary Cecil*, did by her separate trade, and intirely out of the stock so lent, save the sum of twenty pounds, which she intended to place out at interest.

This sum the defendants *Moses*, *Thomas* and *Samuel Juxon* desired they might have on their bond, and she consenting, they executed a bond, and gave the same to her, and she afterwards advanced to the said defendants another twenty pounds, and they gave

gave her a note for the fame: *Mary Juxon* never read either the bond or note, and it appeared that the faid defendants had made the bond and note payable to the defendant *Emanuel Juxon*, and no mention or notice taken that the money was the property of *Mary Juxon*.

CECIL v. JUXON.

The defendant *Emanuel Juxon*, upon his return to *England*, broke open the door of the wife's houfe, and took away the goods that belonged to *Thomas* and *Mary Cecil*, and alfo the very goods and the produce of the ftock which had been lent by *Ann Egginton* to the plaintiff *Mary Juxon*, and were comprized in the faid bill of fale.

Therefore the bill is brought, among other things, for the principal and intereft of the bond and note, and for the re-delivery of the goods, which the defendant *Emanuel Juxon* had forcibly taken away, and that his wife the plaintiff *Mary Juxon* may be quieted in the poffeffion of what fhe had acquired by trade, during the abfence of her hufband.

The defendant *Emanuel Juxon* infifted, that in her dealings fhe made ufe of his name and credit, and that though he was out of the kingdom, yet the plaintiff *Mary Juxon* knew where he was (1), and notwithftanding they lived feparately, yet it was no feparation by agreement, and therefore he being liable to be arrefted for the debts contracted by her in trade, was intitled to the profits and produce of the trade.

Sir *Jofeph Jekyll* was of opinion, as the defertion of the defendant *Emanuel Juxon* was fully proved, this court would look upon any thing acquired by the wife in his abfence, to fubfift herfelf and family, as her feparate property, and not liable to the difpofition of the hufband, when he fhould pleafe to come home and plunder her, and therefore declared that the plaintiff *Mary Juxon* is intitled to the goods that were in her poffeffion, and alfo to the ftock in her feparate trade, before the fame were taken away by the defendant *Emanuel Juxon*, *for her feparate ufe*, and that fhe is alfo intitled to the bond and note, and therefore ordered it to be referred to a Mafter to fee what was due for principal and intereft, and that the fame be paid to the plaintiff *Juxon* for her feparate ufe, and to fee what goods and ftock in trade were taken away, and the defendant *Emanuel Juxon* to deliver the fame in fpecie, to plaintiff *Cecil* and his wife, in truft for the plaintiff *Juxon*, and if the goods are difpofed of, the Mafter to put a value on them, and the defendant *Emanuel Juxon* to pay the value in the fame manner. No cofts of either fide (2).

(1) That he ufed to fend her money, and fometimes came to fee and ftay with her.

(2) *Reg. Lib. A.* 1737. fol. 702.

(F) *Rule as to a Possibility of the Wife.*

July the 31st, 1749.

Grey v. *Kentish.*

Case 149.

Where a particular assignee took with notice of an equity in a will, and the assignees under a commission of bankruptcy against the husband, take subject to the same equity, the court, as it is her property, will decree it to be transferred to her (1).

A ARON Wood gives by his will the moiety that he was intitled to of General *Wood*'s estate, to *Elizabeth Clark* first for life, and then to *Elizabeth Kentish* for life, and afterwards to be equally divided among such of the children of *Elizabeth Kentish*, as should be living at her decease.

This was afterwards, by a decree of the court of Chancery, directed to be laid out in *South-sea* annuities, and the interest thereof to be paid to *Elizabeth Clarke* for life, and after her death to *Elizabeth Kentish* for life, and after her death to her children.

The husband of *Elizabeth Kentish* (2) assigns this legacy to one *Barret*, for securing 150*l.* upon a contingency mentioned in the deed of assignment, which also recites the decree.

The husband afterwards becomes a bankrupt, and the contingency upon which the wife was to take not having happened at the time of the bankruptcy, *Barret* waived his assignment, and chose to come in as a general creditor, and assigned over the legacy to the assignees under the commission of bankruptcy against *Kentish*.

The petitioner (one of the children of *Elizabeth Kentish*, who is now dead) prays the *South-sea* annuities may be transferred to her, she being intitled thereto under the will of *Aaron Wood*.

A husband cannot in law, assign a possibility of the wife, nor a possibility of his own, but this court will support such assignment for a valuable consideration (3).

Lord Chancellor: A husband cannot assign in law a possibility of the wife, nor a possibility of his own, but this court will notwithstanding support such an assignment, for a valuable consideration, though I do not know any case where a person claiming under a particular assignee, has been obliged to make such a provision as is prayed here.

(1) See *Ex parte Coysegame, ante* 192. *Jewson* v. *Moulson, post*, 2 vol. 417.

(2) This part of the case is not stated exactly right. *Elizabeth Kentish* had a daughter, named *Elizabeth Kentish*, who in her mother's life-time married one *Crisp*. *Crisp* made no settlement on his wife, and in the life time of *Elizabeth Kentish* the mother and without the privity of his wife, made the assignment to *Barret* upon the contingency of his wife being alive at her mother's death. *Crisp* became a bankrupt and died in the life-time of the mother *Elizabeth Kentish*. *Barrett* came in as a general creditor under the commission, and assigned the legacy to the assignees. Whereupon *Elizabeth Crisp* petitioned to have the annuities transferred to her, which was ordered accordingly. *Reg. Lib. A.* 174[illegible]. fol. 532.

(3) *Bates* v. *Dandly, post.* 2 vol. 207.

As

As to assignees under a commission of bankruptcy, and the wife of the bankrupt, the court has interposed, and obliged the assignees to make a provision. GREY v. KENTISH.

What makes this case particular is, that there was a decree which ordered the money to be paid to the usher of the court, and it is also in another respect particular, that his was not an absolute assignment, but in the nature of a security only, and is now come back into the hands of the assignees of the husband.

What then is the equity arising to the wife under the decree? It will neither let the husband, if he remained *sui juris*, or, if he becomes bankrupt, his assignees touch the money unless they first make a provision for the wife.

I will put this case; suppose the husband living and no bankrupt, and he had paid off the 150*l.* and had died, would the representative of the husband have been intitled? I am of opinion not, as it was in the nature of a pledge, but would have been the wife's by survivorship. [281]

Or if the husband had died without redeeming the estate of the wife, she would have been intitled to have this estate disincumbred, and the estate would have survived to her.

The particular assignee, having taken with notice of the equity of the wife, and the assignees under the commission taking it subject to the same equity with the particular assignee, I am of opinion it is her property, and therefore shall direct the *South-sea* annuities to be transferred to her.

His Lordship made an order accordingly.

Vide title *Infant, under the Division, How far favoured in Equity,* Smith *v.* Low.

Vide title *Dower and Jointure.*

Vide title *Injunction.*

Vide title *Partition.*

Vide title *Evidence, Witnesses, Proof,* Cotten *v.* Luttrel.

CAP. XVII.

Bills of Exchange.

Vide title *Bankrupt, under the Division, Rule as to Drawers and Indorsers of Bills of Exchange.*

Vide title *Bankrupt, under the Division, Rule as to Principal and Factor.*

(A) *Rule as to an Indorsee.*

Between the Seals after *Hillary* Term 1736.

Lake v. *Hayes.*

Case 150.
Every indorsor is a new drawer.

LORD *Chancellor*: His Lordship said, there has been a difference of opinion amongst judges, Whether a demand must be made upon the drawer of a bill of exchange, to intitle an indorsee to an action, but that he was very clear in his own judgment, there is no occasion to make that demand, for he considered every indorsor as a new drawer (1).

Rule as to the statute of limitations.

[*282] *It was adjudged by the late Master of the Rolls, that a bill in Chancery, which had been depending almost six years, ought not to be considered as a sufficient demand of the debt, so as to take it out of the statute of limitations (2).

(1) *Harry* v. *Perrit*, 1 *Salk.* 133. *Bromely* v. *Frazier*, 1 *Stra.* 441. *Lawrence* v. *Jacob*, *ibid.* 515. *Heylyn* v. *Adamson*, 2 *Burr.* 674. *Sed contra*, *Sidebotham* v. *Smith*, 1 *Stra.* 649. *Collins* v. *Butler*, 2 *Stra.* 1087.

(2) *Craddock* v. *Marsh*, 1 *Cha. Rep.* 205. *Hundiet* v. *Calladon ibid.* 214. *anon.* 2 *Cha. Ca.* 217. *anon.* *post* 2 vol. 1. *Contra*, *anon.* 1 *Vern.* 73.

CAP. XVIII.

Bill.

(A) *Bill of Peace to prevent Multiplicity of Suits.*

(B) *Bills of Discovery, and herein of what Things there shall be a Discovery.*

(C) *Who are to be Parties to it.*

(D) *Bills of Review.*

(E) *Cross Bills.*

(F) *Supplemental Bills.*

(G) *Bill to perpetuate Testimony of Witnesses.*

(A) *Bill of Peace to prevent Multiplicity of Suits.*

December the 5th, 1737.
Case 151.
S.C. post. 2 vol. 302.
Where there has been a possession of a fishery for a considerable length of time, a person who claims a sole right to it, may bring a bill to be quieted in the possession, though he has not established his right at law, and it is no objection upon a demurrer to such bill that the defendants, have distinct rights, for upon an issue to try the general right, they may at law take advantage of their several exemptions, and distinct rights.

Mayor of *York* v. *Pilkington* and others.

A Bill was brought in this court, to quiet the plaintiffs in a right of fishery in the river *Ouse*, of which they claimed the sole fishery for a large tract, against the defendants, who, as it was suggested by the bill, claimed several rights, either as lords of manors, or occupiers of the adjacent lands, and also for a discovery and account of the fish they had taken.

The defendants demurred to the bill, as being a matter cognizable only at law.

Lord Chancellor: Such a bill against so many several trespassers is improper before a trial at law, a bill may be brought against tenants by a lord of a manor for incroachments, &c. or by tenants against a lord of a manor as a disturber, to be quieted in the enjoyment of their common; and as in these cases there is one general right to be established against all, it is a proper bill, nor is it necessary all the commoners should be parties (1); so likewise a bill may be brought by a parson for tythes against parishioners (2), or by parishioners to establish a *modus*, for there is a general right and privity between them and consequently it is proper to institute a suit of this kind (3). [283]

There is no privity at all in the case, but so many distinct trespassers in this separate fishery; besides the defendants may claim a right of a different nature, some by prescription, others by particular grants, and an injunction here would not quiet the possession, for other persons, not parties to this bill, may likewise claim a right of fishing.

It is more necessary too in this case, there should be a trial at law, for it does not clearly appear, whether there is a right even in the plaintiffs (4), and if it should eventually come out that the corporation of *York* are lords of this fishery, then would be the proper time to have an injunction to prevent their being disturbed in their possession. His Lordship therefore allowed the demurrer.

This demurrer was set down to be re-argued on the 13th of *March* 1737, when, in support of it, it was urged, that though

(1) *Vide Rudge* v. *Hopkins*, 2 *Eq. Ab.* 170. *pl.* 27. *Poore* v. *Clark*, *post.* 2 vol. 515.

(2) *Brown* v. *Vermuden*, 1 *Cha. Ca.* 272.

(3) A Bill will not lie to direct an issue to ascertain boundaries between two parishes. *Parish of St. Luke* v. *Parish of St. Leonard*, 1 *Bro. Cha. Rep.* 40.

(4) *Vide Cressett* v. *Mytton*, 3 *Bro. Cha. Rep.* 481.

Mayor of York v. Pilkington.

it is charged in the bill, that this bill is to prevent multiplicity of suits, yet that was never allowed in this court, where the defendants have all different titles, and depend upon various matters and rights, and is not like the case of lords and tenants, or parsons and parishioners, nor properly under the rule of bills of peace, for no other party who has a title or right of the same nature, could be bound by this bill: the plaintiffs say, they have a prescriptive right, this being a publick royal river, the defendants, being lords of manors, may have the same right, or for the same reason they cannot prescribe for that, unless for some consideration paid.

Mr. Attorney-General *e contra*. The defendants never attempted to set up this exclusive privilege till now, but have always applied for leave to the plaintiffs; the defendants are owners of lands and lords of manors adjoining to this river, and it may properly be determined, whether the plaintiffs have that sole and separate right of fishery, and that is incumbent on the plaintiffs to prove; such bills have been brought by the city of *London* for some certain duties, and though a great many particular rights have been insisted on, yet a general issue has been directed to try the right. In the case of v. *Carter*, 1734, a bill was brought by the lord of the manor of *Stepney*, for sixpence on every load of hay carrried to *Whitechapel*, though the lord, house-keepers, and scavengers claimed each some right in the sixpence, yet one general issue was directed by lord *Talbot* to try that question, and the demurrer in that case was over-ruled.

Lord Chancellor: When this case was first argued, I was of opinion to allow the demurrer, but I have now changed my opinion.

[284] Here are two causes of demurrer, one assigned originally, and one now at the bar, that this is not a proper bill, as it claims a sole right of fishery against five lords of manors, because they ought to be considered as distinct trespassers, and that there is no general right that can be established against them, nor any privity between the plaintiffs and them.

In this respect it does differ from cases that have been cited of lords and tenants, parsons and parishioners, where there is one general right, and a privity between the parties. But there are cases where bills of peace have been brought, though there has been a general right claimed by the plaintiff, and yet no privity between the plaintiffs and defendants, nor any general right on the part of the defendants, and where many more might be concerned than those brought before the court: such are bills for duties, as in the case of the city of *London* v. *Perkins* (1) in the House of Lords, where the city of *London* brought only a few persons before the court, who dealt in those things whereof the duty was claimed, to establish a right to it, and yet all the king's subjects may be concerned in this right; but because a great number of actions may be brought, the court suffers such bills, though the defendants might make distinct defences,

(1) 4 *Bro. Par. Ca.* 158.

defences, and though there was no privity between them and the city.

Mayor of York v. Pilkington.

I think therefore this bill is proper, and the more so, because it appears there are no other persons but the defendants who set up any claim against the plaintiffs, and it is no objection that they have separate defences; but the question is, whether the plaintiffs have a general right to the sole fishery, which extends to all the defendants; for notwithstanding the general right is tried and established, the defendants may take advantage of their several exemptions, or distinct rights.

Another cause of demurrer is, that the plaintiffs have not established their title at law, and have therefore brought their bill improperly to be quieted in possession. Now it is a general rule, that a man shall not come in to a court of equity to establish a legal right, unless he has tried his title at law, if he can (1); but this is not so general an objection as always to prevail, for there have been variety of cases both ways.

There are two cases reported together in *Prec. in Eq.* 530. *Bush* v. *Western*, and the *Duke of Dorset* v. *Serjeant Girdler* (a); in the former it was held, that a man who has been in possession of a water-course sixty years, may bring a bill to be quieted in his possession, although he had not established his right at law; in the latter, that a man who is in possession of a fishery, may bring a bill to examine his witnesses *in perpetuam rei memoriam*, and establish his right, though he has not recovered in affirmance of it at law; otherwise, if he is interrupted and dispossessed, for then he had his remedy at law.

(a) 2 Eq. Abr. 181. pl. S. C.

In the present case the demurrer was over-ruled (2).

(1) See *anon.* 1 *Vern.* 120. *East India Company* v. *Sandys, ibid.* 127. *Pawlet* v. *Ingres, ibid.* 308 *East India Company* v. *Interlopers*, 2 *Cha. Ca.* 165. *Whitchurch* v. *Hyde, post.* 2 vol. 391. Lord *Teynham* v. *Herbert, post.* 2 vol. 483. *anon.* 2 *Ves.* 414. *Weller* v. *Smeaton* 1 *Bro. Cha. Rep.* 572.

(2) See the difference between this case and that of Lord *Teynham* v. *Herbert, post.* 2 vol. 483.

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Conyers and Others, ——— ——— Plaintiffs.

Lord *Abergavenny* and Others, ——— ——— Defendants.

November the 16th, 1738.

Case 152.

A Motion by the plaintiff for an injunction to stay the proceedings of the defendants at law till the hearing of the cause in this court, upon a suggestion that this is a bill of peace, and always favoured in equity, for the principal prayer of it is, that the defendants who have only a small interest in that part of the manor of *Tunbridge*, which is in dispute, may accept of such a compensation as this court shall think reasonable, for the houses the plaintiff has built upon the waste.

A bill of peace praying an injunction to stay the defendants, who have an interest in the manor of *Tunbridge*, from proceeding at law against the plaintiffs for building houses on the manor without leave, and that they may accept of such a compensation as the court shall think reasonable.

Lord

Conyers v. Lord Abergavenny. The court dissolved the injunction, as they cannot be applied to as an arbitrator, nor have any legislative authority, but act in a judicial capacity.

Lord Chancellor: I do not see how this court can assume such a power, unless they had a right of being applied to as an arbitrator, or had a legislative authority lodged in them, neither of which belong to them; for they act only in a judicial capacity.

A bill of peace may as well be brought by tenants against a lord, as by a lord against tenants.

The proper bill of peace was a former one, brought by the tenants of this manor, for such a bill may as well be brought by tenants against a lord, as by a lord against tenants (1); but that bill was dismissed, upon the suggestion of this very plaintiff Mr. *Conyers* himself, that they ought regularly to proceed at law; and therefore thither let him go, and not apply improperly for relief in that court, which he had absolutely insisted had no power of relieving. This comes very near the case of election, for he has chosen to proceed at law, and therefore let him seek his remedy there.

His Lordship for these reasons ordered the injunction to stand dissolved.

(1) See the *Mayor of York* v. *Pilkington*, ante 282. *Lord Teynham* v. *Herbert*, post. 2 vol. 483, notes.

(B) *Bills of Discovery, and herein of what Things there shall be a Discovery.*

February the 9th, 1737.

Case 153.

Phipps v. *Steward* (1).

SIR *Robert Cowan*, intending to leave *England*, declared to the plaintiff he had made his will, and that after giving his personal estate to his daughter and the heirs of her body, he had limited the same to the plaintiff.

(1) Sir *R. Cowan* resided at *Bombay*, and being about to sail for *England* made his will dated the 4th of *January* 1734, and thereby directed his personal estate to be laid out in the purchase of lands to be settled to the use of his brother in tail, remainder to his sister in tail, remainder to the plaintiffs in fee; and in case of his brother's death he directed that his personal estate should be remitted to the plaintiffs for the purposes aforesaid. Sir *R. Cowan* before his death in 1736, told the defendant *Steward*, that he had made his will, but had left it at *Bombay*, and had only a *copy* of it with him. The brother died in the *East Indies*. After the testator's death, *Steward* married the sister, and applied for letters of administration for her, and possessed himself of the books, papers, and part of the personal estate of the testator. Pending the suit in the ecclesiastical court, the plaintiffs brought their bill for an account of the personal estate, and to have the same laid out in *South-sea* annuities until the same could be laid out in the purchase of lands. To this bill the defendant demurred; which demurrer was over-ruled. The defendants were restrained from receiving or alienating any part of the said testator's personal estate till further order. *Reg. Lib. B.* 1737. *fo.* 136.

Some

Some time after Sir *Robert Cowan* died, the daughter married the defendant, and upon a supposition that there was no will, administration was applied for by the daughter in the spiritual court; pending a suit there, the present bill was brought by the plaintiffs to have an account of the personal estate.

PHIPPS v. STEWARD.

While a suit is depending in the ecclesiastical court for an administration, a bill may be brought here for an account of the personal estate. The reason why a bill is allowed to be brought before probate is, that the ecclesiastical court have no way of securing the effects in the mean time.

To this bill the defendant demurred, for that there was a suit now depending in the spiritual court for administration to the personal estate of Sir *Robert Cowan*.

Lord Chancellor over-ruled the demurrer; and said, in the case of *Powis* v. *Andrews*, a bill of this nature was allowed before probate, and that determination was founded on a former case of *Japhet Crooke*, in the time of Lord *Harcourt*, relating to the will of Mr. *Hawkins* (*a*).

A devise of personal estate to *A.* and the heirs of her body, it has never been solemnly determined, that where money is so entailed, the whole shall go to the first taker.

(*a*) 1 Vern. 104. Wright v. Blick, and 2 Vern. 49. Dulwich College v. Jackson (1).

The reason for these cases is, that the ecclesiastical court have no way of securing the effects in the mean time, nor did he know there was any solemn resolution, where money is entailed in the manner the testator has done here, that the whole of it shall go to the first taker (2). The case of *Colvel* v. *Shadwell* in the time of Lord *Cowper* is to the contrary (3).

His Lordship restrained the defendants from receiving any more of Sir *Robert Cowan*'s personal estate till further order.

(1) *Andrews* v. *Powis*, 2 Bro. Par. Ca. 476. *Morgan* v. *Harris*, 2 Bro. Cha. Rep. 121. See *Montgomery* v. *Clarke*, post. 2 vol. 378. *Smith* v. *Akywell*, post. 3 vol. 566.

(2) *Vide Seale* v. *Seale*, 1 P. W. 290. *Dod* v. *Dickenson*, 8 Vin. 451. pl. 25. *Butterfield* v. *Butterfield*, 1 Vef. 133. 154. *Daw* v. *Pitt*, Fearne 347. *Ivie* v. *Ivie*, post. 429. *Saltern* v. *Saltern*, post. 2 vol. 376. *Stratton* v. *Payne*, 3 Bro. Par. Ca. 577. *Earl of Chatham* v. *Tothill*, 6 Bro. Par. Ca. 450. *Hodgeson* v. *Bussey*, post. 2 vol. 89. note 1.

(3) 1 *P. W.* 470. 485.

Woodcock v. *King*.

January the 23d, 1738.

Case 154.

IT was in this case laid down by *Lord Chancellor* as a general rule, that where a bill is brought for a discovery merely, and prays no relief, you cannot move to dismiss it for want of prosecution, but can only pray an order upon the plaintiff to pay to the defendant the costs of suit to be taxed by a Master (1).

Where a bill is for a discovery merely, you cannot move to dismiss it for want of prosecution, but pray an order only on the plaintiff to pay defendant the costs of the suit to be taxed.

(1) See *anon.* post. 2 vol. 15. *Jones* v. *Jones*, post. 3 vol. 111.

February the 28th, 1738.

Atkins v. Farr.

Case 155.

S. C. 2 Eq. Ca. Abr. 247. pl. 32. 25 Vin. Abr. 296. pl. 3.

The defendant voluntarily gave the plaintiff a bond in the penalty of 1000 *l.* on condition that if he did not marry her within a twelvemonth after date he would pay her 500 *l.* Soon after, under pretence of reading it, he took it against her consent, and carried it away with him. The bill brought for the delivery of the old bond, or, if cancelled, that he may execute a new one. The plaintiff in the original bill dying intestate, the mother, as administratrix, and thereby intitled to the 500 *l.* revived against the defendant. The plaintiff, as the bond was gone by the default of the defendant, is therefore intitled not only to a discovery here, but relief by payment of the money, and the defendant agreed to pay what is due for the principal sum of 500 *l.* in the condition of the bond, with interest for the same at the rate of 4 *per cent.* from the day of filing the original bill (1).

THE plaintiff in the original bill, and daughter of the present plaintiff, did thereby charge, that being a single woman, she became acquainted with the defendant, who made his addresses to her by way of courtship, and for marriage, and she consented thereto; and that on the 9th of *February* 1732, he voluntarily executed to her a bond in the penalty of 1000 *l.* on condition that if the defendant did not marry her within a twelve month after date, he would pay her 500 *l.*

On the 17th of *March* following paying her a visit, and saying he was desirous to read the bond, she fetched it him, and at the defendant's request gave it him to read, who took it, and against her consent put it into his pocket, and immediately went away with it; but coming to her again the next day, she insisted on the bond, but he pretended he had burnt it, and would execute another bond of the like purport, and desired her to get it drawn. She accordingly applied to the person who drew the former bond, and he in pursuance of the defendant's directions ingrossed a new bond to the same effect with the other, and the defendant promised to execute the same, but afterwards absolutely refused to do it. And she therefore by her bill prayed that the defendant might be decreed, if he had not cancelled the bond, to deliver the same again, and in case he had destroyed it, then to execute a bond of the like tenor.

The defendant, by his answer to the original bill, admitted that in 1732 he became acquainted with *Mary Atkins*, but that she was then, and before, a woman of very bad fame and character; and had been an orange girl in the playhouse, and that he never made any addresses to her, except such as are usually made to women of ill character, and that during his acquaintance with her he did execute a bond conditioned for a marriage within twelve months, but, when he executed it, apprehended it would not be of any validity against him; and that about two months after the execution of the bond, some difference arising between them, she of her own accord delivered him the bond, telling him at the same time she had a gentleman would do better for her, and that he then put the bond into his pocket, and that she did not within 12 twelve months after her giving up the bond inquire after, or ask for the same, till the demand set up by her

(1) See *Woodhouse* v. *Shepley*, post. 2 vol. 535. *Key* v. *Bradshaw*, 2 Vern. 102.

bill,

bill, and that he never promised to give her any bond of the like effect, or ever gave directions for any other to be drawn, and insists, as she delivered it up voluntarily, that he ought not to be obliged to execute any other bond. Atkins v. Farr.

The plaintiff in the original bill dying intestate, and the mother having taken out administration, and thereby become intitled to the 500*l.* due from the defendant by his bond, brought her bill of revivor against him.

Lord Chancellor: The plaintiff in the original bill had certainly an equity founded on the bond's being gone by the default of the defendant, on which she might have had her remedy at law, and therefore was intitled not only to a discovery, but relief by the payment of the money; and though the proof of the bond's being forced from her is by one witness only, it is no objection in this case, for the plaintiff herself was intitled to make oath of the loss of the bond, and that it was thus taken from her; and as this fact is proved by the oath of one witness against the oath of the defendant in his answer, and as there is likewise proof of the defendant's offering to execute a new bond, that is a circumstance supporting the evidence of this single witness, sufficient to take it out of the general rule; nor are there any collateral circumstances to bar her, for no other averment was necessary to be made at law, if she had the bond, than that the money was not paid; and as she has by the defendant's fault lost the bond; she has sufficiently averred it in her bill; nor was there a necessity that the promise should have been reciprocal in this case, or any occasion for the court to relieve against the penalty of the bond, because it is not insisted on by the original bill, which is brought merely for the five hundred pounds, which must be considered as the stated damages between the plaintiff and defendant.

His Lordship therefore ordered that it be referred to a Master to compute what is due for the principal sum of 500*l.* mentioned in the condition of the bond, with interest for the same from the day of filing the original bill, at the rate of 4 *per cent. per ann.* And decreed the defendant to pay what shall be so found due to the plaintiff, and also the costs of this suit (1).

(1) *Reg. Lib. A.* 1738. fol. 310. See the difference between this case and that of *Woodhouse* v. *Shepley*, *post.* 2 vol. 539.

Dunn and Others, ——— ——— Plaintiffs. *November* the 24th, 1738.

Coates and *Balguy*, ——— ——— Defendants.

Case 156. 8 Vin. Abr. 337. pl. 9. S. C. 2 Eq. Cas. Abr. 78. pl. 11. id. 629. pl. 1. S. C.

THE defendant had instituted a suit in the ecclesiastical court, for a church rate, to which there was a custom pleaded of something done in lieu of the rate, and that plea admitted.

This court will not admit a bill of discovery in aid of the jurisdiction of the ecclesiastical court, because they are capable of coming at that discovery themselves.

Dunn v. Coates.

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And now a bill is brought here for an injunction to stay the defendant's proceedings in the ecclesiastical court, and to be relieved against the rates, and to compel a discovery from the defendant *Balguy* of the value of the respective real and personal estates of the several inhabitants of the several parishes and places in the bill mentioned, and how the money collected by means of the said rates had been disposed of.

The defendants demurred to so much of the bill as sought to stay the proceedings in the ecclesiastical court by injunction, and also as to the discovery prayed thereby, as the matters contained in such part of the bill as they demurred to, were properly cognizable in the ecclesiastical court; and, if true, ought to have been insisted on there, or at common law, and was not a proper foundation for a bill in this court.

Where there is a custom pleaded to a suit in the ecclesiastical court for a church rate, and the plea admitted, they may proceed to try the custom, but if denied, 'tis a ground for a prohibition.

Lord Chancellor: This court will not admit a bill of discovery in aid of the jurisdiction of the ecclesiastical court because they are capable of coming at that discovery themselves.

If there is a suit instituted in the ecclesiastical court for a church rate, and a custom pleaded of a certain sum in lieu of the rate, or something done in the room of it, and that plea admitted, they may proceed to try that custom in the same manner as a modus; but if the custom is denied, it would be a proper ground for a prohibition, *propter triationis defectum in curia ecclesiastica*, for the trying of the custom is the province of the common law (1).

His Lordship was of opinion it was a good demurrer, and therefore ordered that the same do stand and be allowed (2).

(1) *Anon.* 2 *Vef.* 451. (2) *Reg. Lib. A.* 1738. fol. 49.

Hilary Term, 1747.

Case 157. *Boden* and others, Assignees of *Dellow* a Bankrupt, v. *Dellow* and others.

Where a bill is brought for the discovery of concealments of a bankrupt's estate, the court will not allow the defendants to look into their depositions taken before the commissioners before they put in their answer.

THE assignees suspecting the bankrupt had made concealment, examined a great many of his relations at *Guildhall*, and have now brought a bill against the same persons for discovery of those concealments.

Mr. *Green* moved on the part of the defendants, that they might be allowed to look into their depositions before the commissioners, in order to make their answers consistent.

Lord Chancellor: I will not grant the motion (1) for as truth is always uppermost, they may, if they please, put in an answer consistent with what they have already sworn in their depositions, supposing they are true; if false, they swore, at their own peril,

(1) The defendants prayed to be at …y to take copies of the depositions …r to put in their answers, and for …h's further time to put in their answers. Ordered, that the said defendants have a month's further time to put in their answers to plaintiff's bill. *Reg. Lib. A.* 1747. fol. 167.

and

and I will not give leave to see them, merely for their own security, that they should not swear differently in one, from what they had done in the other.

Boden v. Dellow.

(C) *Who are to be Parties to it.*

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Herring v. *Yoe.*

February the 8th, 1737.

Case 158.

A Marriage settlement having been made of certain lands on the husband for life, remainder to the wife for life, with divers remainders over; the present bill was brought by the husband in order to have the opinion of the court whether a certain parcel of land was not intended to be included in that settlement.

There was an objection taken at the hearing of the cause, that the wife was not made a party.

Lord Chancellor allowed the objection, for he said if the court should be of opinion against the husband, such decree would not bind the wife; his Lordship therefore ordered the cause to stand over, that the wife might be made a party (1).

A husband tenant for life, remainder to his wife for life, &c. brings a bill alone for the opinion of the court upon the settlement; objection for want of making the wife a party allowed.

(1) *Reg. Lib. A.* 1737. *fol.* 198.

(D) *Bills of Review.*

June the 29th, 1738. At *Lincoln's-Inn Hall.*

Catterall v. *Purchase.*

Case 159.

IN a cause that came before the court upon a bill of review to read some charges out of the original bill, the plaintiff offered to shew some errors in the decree. To this it was objected, that no errors in the decree were cognizable, but what appeared on the face of the decree, and therefore any evidence of errors but from the decree itself was opposed.

Lord Chancellor: It is true, on arguing a demurrer to a bill of review, nothing can be read but what appears on the face of the decree; but after the demurrer is over-ruled the plaintiffs are at liberty to read bill or answer, or any other evidence as at a rehearing, the cause being now equally open; to which purpose the case of *Jackson* v. *Francis* was cited by Mr. *Brown.*

On arguing a demurrer to a bill of review, what appears on the face of the decree can be read only, but after a demurrer over ruled, a plaintiff may read any evidence as at a rehearing.

(E) *Cross Bills.*

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Creswick v. *Creswick.*

January the 12th, 1738.

Case 160.

IT was in this case laid down by *Lord Chancellor* as a general rule, that where the defendant in a cross bill, who is plaintiff in the original, is in contempt for not putting in an answer to

Where a defendant in a cross bill, but plaintiff in the original, is in contempt for not putting in an answer, the proper motion is to inlarge publication in the original to a fortnight after the answer is come in to the cross bill.

CRESWICK v. CRESWICK.

the cross bill, it is irregular to move to stay proceedings in the original cause, till such answer comes in, but the plaintiff in the cross bill, may have publication in the original inlarged to a fortnight after the answer to his bill is come in (1).

(1) *Ramkissenseat* v. *Barker*, *ante* 21. *Aylet* v. *Easy*, 2 Ves. 336.

(F) *Supplemental Bills.*

March the 19th 1736.

Brown v. *Higden.*

Case 161.

It is a constant rule, that matters subsequent to the original bill, must come by way of supplemental bi and revivor (1)

AN original bill was brought by a creditor against Mrs. *Higden* as administratrix of *A.* who being a married woman, her husband was also made a party.

Before the cause was heard the wife dies, and the husband took out administration *de bonis non*, &c. of *A.* upon which the plaintiff amended his bill against the husband, to which amended bill the defendant demurred. *For any matter which happens subsequent to the original bill, cannot be put into an amended bill*, but a bill of revivor and supplemental bill ought to be brought.

Mr. *Verney* for the plaintiff insisted that in equity the suit abated only against the wife, and cited the case of *Humphreys* v. *Humphreys*, 3 *Wms.* 349. there the bill charged, by way of amendment, matters which arose after filing of the bill, and therefore seemed a proper case for a supplemental bill, and tho' this was pleaded to the bill, yet the plea was over-ruled, for that such matters may be charged either by way of supplemental, or by way of amended bill.

Though by the 8 *Will.* 3. a suit shall not abate upon death of one defendant, yet it must be taken with this restriction, that the subject matter of the bill is not hurt thereby.

Lord Chancellor: I am of opinion that the demurrer ought to be allowed (2); for I take it to be the constant rule, that matter subsequent to the original bill, must come by way of supplemental bill and revivor: besides the suit abated intirely by the death of the wife; for the husband who was before joined for conformity only, has an interest now, and tho' by the statute of the 8 *Will.* 3. a suit shall not abate upon the death of one defendant, but shall go on against the others, yet it must be taken with this restriction; provided, the subject matter of the bill is not hurt by the death of such defendant.

(1) See *Jones* v. *Jones*, post. 3 vol. 217. (2) *Reg. Lib. A.* 1736. *fol.* 211

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(G) *Bill to perpetuate Testimony of Witnesses.*

Vide title *Evidence*, *Witnesses*, *Proof.*

Bill. *Vide* title *Award.*

Bill. *Vide* title *Answers*, *Pleas*, *and Demurrers*,

Bill. *Vide* title *Amendment.*

CAP. XIX.

Bonds and Obligations.

Ramsden v. *Jackson*.

February the 1st, 1737.

Case 162.

A voluntary bond for the payment of a sum of money after the death of the obligor in the nature of a legatory disposition is a valid bond (1).

SUSANNAH *Ramsden* having entered into a bond for the payment of a considerable sum of money to the defendant at her death, in the nature of a legatory disposition of so much secured by bond, and the defendant having obtained judgment on the bond against the plaintiff her executor, the bill was brought by him to have the bond and judgment set aside, suggesting there was no consideration for entering into it, and that it was obtained by improper means.

Lord Chancellor: I am of opinion against the plaintiff on the merits that the bond is a good one, and therefore the only question will be on what terms the plaintiff should be relieved against the recovery at law, and some relief he is clearly intitled to, the judgment being for the whole penalty of the bond.

For the plaintiff it was insisted, that he had a right to be relieved not only against the penalty, but likewise against the principal sum in the condition of the bond, or part of it at least, it being suggested that there is a deficiency of personal assets, and the plaintiff chargeable no further than he had assets.

The fact as to this was, that the plaintiff here pleaded *non est factum* to the bond at law, and had a verdict against him, and judgment in the usual form, *de bonis testatoris, sed non de bonis propriis*. And it was admitted the plaintiff in this respect stands exactly in the same light as he would at law, and the question is, whether, when an executor pleads *non est factum*, *non assumpsit*, *&c.* and verdict against him, that will not amount to an admission of assets, or if after such verdict, he may still defend himself, by denying assets, and that matter be controverted on the sheriff's return to a *scire fieri* inquiry or otherwise. [293]

Mr. *Fazakerly* for the defendant insisted that the verdict was an admission of assets, and that this case was the same with a judgment confessed by an executor, or had against him by default, and upon his memory referred to a case in *Salkeld's* Reports, where it had been so ruled: He admitted the executor was not chargeable *de bonis propriis* in respect of his false plea, which he said, and it was agreed by *Lord Chancellor*, held only in the case of *ne unques executor pleaded*. But that the executor in this case having thought fit to put his defence on the denial of the execution of the bond, and not having pleaded *plene administravit*, or by plea admitted assets to such sum, and *riens ultra*, &c. or made use of any defence of that kind, he cannot now resort to any such matter, or have the benefit thereof by any subsequent proceeding; that executors were in this respect only

(1) *Vide Drakeford* v. *Wilkes*, *post*. 3 vol. 540.

RAMSDEN v. JACKSON.

upon the same foot with all other persons, and nothing is better established than this rule, that no advantage can ever afterwards be taken, of what might have been insisted on by way of defence, and pleaded to the action: Nothing pleadable *puis darrien continuance*, which was *in esse* at the time of the plea pleaded: He observed likewise that the disability a defendant at law was under, of making a double defence, gave occasion to that provision in the statute for the amendment of the law, the 4 *Ann. c.* 16. *s.* 4. with regard to pleading several matters; there was no occasion otherwise for any such law in the case of executors, nor any reason for pursuing it now in those cases, though it is every day's practice: For if an executor, after a verdict against him on such a plea as this or any of the like kind, may afterwards say he has no assets; that method of proceeding will be equally beneficial to him, and there would be no occasion ever to apply to the court for leave to plead *plene administravit*, and any other plea. That the executor here might have applied to the court for leave to plead double, but not having done so, the case stands upon the same foot it would have done before the act.

Lord Chancellor: I agree with Mr. *Fazakerly*, the statute for the amendment of the law is quite out of the question, the name of the case hinted at by Mr. *Fazakerly*, is *Rock* v. *Leighton*, *Salk.* 310. but on looking into that case, I find the resolution there, goes only to a judgment had against executors, either by confession or default (1), but no further; that the rule is in general as has been laid down, that advantage cannot be taken afterwards, of what might have been pleaded to the action; as for instance, in the case of a *scire facias* on a judgment, nothing can be pleaded thereto, which might have been pleaded to the action; but though I am inclined to think the verdict was an admission of assets, yet I will not give an absolute opinion, because the cause must be postponed at present, in order that the will may be produced, and the state of the assets laid before the court, and the disposition by the testatrix of her real and personal estate;

[294] the fact, whether there were assets or not, being disputed by the parties (*a*).

(*a*) Cro. Jac. 294. Legate *v.* Pinchion.

A voluntary bond in equity shall be postponed to debts on simple contract, and if claimed for money lent, and the person fails in proving his consideration, it cannot be set up afterwards as a voluntary bond.

N. B. The bond against which the relief is prayed, being a voluntary one, it was admitted clearly it must be postponed in equity to debts by simple contract (2), and also that where a bond is claimed in consideration of money lent, and the person fails in proving his consideration, he shall not be allowed afterwards to set it up as a voluntary bond (*b*).

(*b*) Prec. in Chan. 17.

(1) *Skelton* v *Hawling*, 1 *Wils.* 258. S. C. *ibid* 152. *pl.* 4 S. C. *Craye* v. 202. S. C. 1 *Eq. Ab.* 143. *pl.* 15.

(2) *Fairbeard* v. *Bowers*, 2 *Vern.* *Rooke*, *Ca temp. Talb.* 153. *Blount* v. *Doughty*, *post.* 3 vol. 483.

This

This point coming on again, whether the plea of *non eſt factum* admitted aſſets, *Lord Chancellor* held it did, and ſaid he had ſeen Lord Chief Juſtice *Holt*'s report of the caſe of *Rook* v. *Leighton*, where the very caſe now in queſtion was put by *Holt* Chief Juſtice, who ſaid the law was the ſame as in the caſe of a judgment by default againſt an executor, though that is not mentioned in the report of the caſe by *Salkeld* (1).

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If an executor pleads *non eſt factum* to a bond, and not *plene administravit* likewiſe, he cannot after verdict take advantage of what might have been pleaded to the action. The plea of *non eſt factum* only is an admiſſion of aſſets, and held the ſame as in caſe of a judgment by default againſt an executor.

Decreed that the plaintiff ſhould be relieved againſt the penalty of the bond, on payment of principal and intereſt, &c. without any regard had at all to the queſtion, whether the executor had aſſets or not to pay ſuch principal and intereſt.

Can be relieved only againſt the penalty of the bond, by paying principal and intereſt, without regard to his having aſſets or not.

(1) See *Erving* v. *Peters*, 3 Durn. & Eaſt 685.

Michaelmas Term, 1738.

Bower v. *Swadlin*.

Caſe 163.

AN obligee gave a releaſe to one of the obligors in a bond, the bill brought by the repreſentative of the obligee, and likewiſe by a truſtee under the aſſignment of this bond, for the ſum conditioned to be paid by the bond.

A releaſe to one obligor, is a releaſe to both in equity as well as at law (1).

The defendant inſiſted by way of plea, that a releaſe to one co-obligor, is a releaſe to all.

Lord Chancellor: There is no doubt but a releaſe to one obligor is a releaſe in equity to both, as well as in law; but if there be an aſſignment of the bond in truſt for the benefit of others, precedent to the releaſe, though the aſſignment be with or without conſideration, it will be a material queſtion, whether the obligee could releaſe, or if it could operate to the releaſee, as he muſt be preſumed to have notice of this aſſignment, being himſelf a truſtee in the aſſignment, and every man is ſuppoſed to be conuſant of a deed to which he is a party

Where there is an aſſignment of a bond in truſt for others, precedent to a releaſe, though without conſideration, it will be a material queſtion, whether the obligee could releaſe, or if it could operate to the releaſee, as he is a truſtee in the aſſignment. Every man is ſuppoſed to be conuſant of a deed, to which he is himſelf a party.

His Lordſhip directed that the cauſe ſhould ſtand over till the defendant had anſwered to the date of the releaſe; for it does not appear at preſent, whether the releaſe was precedent or ſubſequent to the aſſignment. [295]

(1) Shep. Touch 335 Har. Co. Lit. W. 237. *Skep.* v. *Hay*, poſt. 3 vol. 232. a. note 1. *Ex parte Smith*, 1 P. 91.

Atkins v. *Farr*.

Febr. the

Vide title *Bill*, *under the Diviſion*, *Bills of Diſcovery*, *and herein of what there ſhall be a Diſcovery*.

CAP. XX.

Bottomree Bonds.

January the 18th, 1750.

The Earl of *Chesterfield* Executor of *Spencer* v. *Janson*.

Vide title *Catching Bargain*.

CAP. XXI.

Canon Law.

June the 9th, 1737.

Sir *Henry Blount*'s case.

Case 164.

LORD *Chancellor*: A suit was instituted in the court of chivalry against Sir *Henry Blount*, baronet, for assuming and usurping arms, *&c.* as his own proper arms, which neither he nor any of his family ought to bear. In the progress of this cause, an allegation was exhibited by the defendant, setting forth that all pedigrees whatsoever must be signed by the proper hands of the parties, requesting such entries to be made in the books belonging to the college of arms, and then objects to the validity of some of the entries in the said books, as not being signed, and therefore no credit to be given to them; but this allegation was rejected by the judge of the court of Chivalry, and the defendant petitioned the court of Chancery, in order to obtain a commission of Delegates to determine the said ap- [296] peal; on the other side there is a cross petition, insisting that no appeal lies but only from a definitive, or final interlocutory decree, having the force of a definitive sentence.

Lord Chancellor: I observe no objection has been made to the jurisdiction of the court of Chivalry, but only an appeal from an act of that court in their ordinary jurisdiction, and therefore as it is not insisted on, in Sir *Henry Blount*'s petition, it must be thrown out of the case.

There are two questions arising upon the present case.

First. Whether an appeal will lie from any sentence of the court of Chivalry, except a definitive one, or from such a sentence as is termed in the Civil law, *gravamen irreparabile*.

Secondly, Whether this particular sentence of the court of Chivalry, is a *gravamen irreparabile*.

The court of chivalry proceed according to the rules of the Civil law, except in cases omitted, and there they go according to the course and custom of chivalry and arms.

It has been admitted on all sides, that the court of Chivalry proceed according to the rules of the Civil law, except in cases omitted, and there they are governed by the course and custom of chivalry and arms, and it is so laid down in 4 *Co.* 425.

There

There hath been no precedent cited in the arguing of this case as to the custom or course of the court of Chivalry in this particular respect, therefore it must be brought under these rules of the civil law with regard to appeals, that is, so far as the Civil law has been admitted in *England*. BLOUNT's Case.

By the Canon law, you are admitted to appeal from all grievances in general, but in the Civil law only where *gravamen est irreparabile*.

By the canon law an appeal is admitted from all grievances in general; but as the court of chivalry is governed by the Civil law, this court will not grant a commission of delegates upon an appeal from any interlocutory order of that court, except only where there is a definitive sentence, or such a one as is termed in the civil law, *gravamen irreparabile*.

The authors upon this head are very numerous; but to shew that this has been allowed in *England*, I shall mention only *Clark's Praxis Curiæ Admiralitatis Angliæ*, who is an author of undoubted credit, and very full upon this head. His Lordship then cited several instances out of the 50th and 51st chapter.

These rules are extremely clear, and very applicable to the present purpose; for says the author, although the party propounds exceptions to witnesses, and the court of admiralty reject them, yet there can be no appeal; for in the appeal from the definitive sentence, you may equally propound the same exceptions, nor are you precluded from it.

This is the rule then of the Civil law, in the proceedings of the court of admiralty, and founded upon very good reason, for else it would make causes there unnecessarily tedious, if appeals should be allowed upon every trifling or supposed grievance; This had great weight with me in the argument, and upon search made in the court of admiralty by both sides there is no precedent to be found of an appeal of this kind.

Doctor *Paul* cited a case of *Grundel* and others, against *Gawne* and company.

This suit commenced in the court of admiralty in *January* 1705, and heard at the delegates in *March* 1706, it was brought for wages due to the plaintiffs as mariners, and prayed that the defendants might set forth, whether they were owners of the ship *Speedwell*, bound on a voyage from the port of *London*, to the *East Indies*; this libel or summary petition was admitted, and the defendants gave in an answer upon oath, but insisted they were not obliged to discover upon what voyage the ship was bound, because it would subject them to the penalties of the statute of the 10 *Will.* made in favour of the *East India* company; but notwithstanding the judge of the court of admiralty decreed, that they should make further answer as to their respective interests in the said ship, and whether they were or were not owners at the time in the summary petition mentioned. From this act, the defendant appealed to the delegates, who pronounced against the appeal, remitted the cause, and condemned *Gawne* and company in costs. [297]

But

Blount's Case.

But this differs widely from the present case, for the judge of the court of admiralty there had committed an error, which was *gravamen irreparabile*, for if the defendant had answered, the cause would have been at an end, for, by the confession they must necessarily have made, their own answer would have destroyed them.

In the case of the earl of *Coventry* in 1701, against *Gregory King*, which was in the nature of a criminal prosecution, for having contrary to his oath, and the duty of his office, as *Lancaster* herald, caused the arms of his father to be impaled with false arms, *&c. King* gave a negative answer to the libel; but it being insisted on behalf of lord *Coventry*, *King*'s answer should be on oath, so far as he was obliged by law to answer, it was alledged by the defendant that the said libel contained criminal matter, and therefore lord *Coventry*'s petition ought not by law to be admitted, and prayed the same to be rejected; but the judge decreed he should give his answer on oath to such of the articles, as he was obliged by law to answer. Upon an appeal to the court of delegates in 1702, they allowed the appeal from the interlocutory order.

This too is very wide from the present case, for if *King* had made a confession upon oath, the cause would have been over; and therefore it was *gravamen irreparabile*, and cannot be used as an authority for Sir *Henry Blount*, for his case depends upon different circumstances.

Then the question will be, Whether this decretal order be *gravamen irreparabile*.

By the laws of the college of arms, all pedigrees entred in their books, must be signed by the parties requesting such entries to be made, and all the ancient books are so; and it has been held, that no pedigree in law is good without it; and then Sir *Henry Blount* goes on, and applies this to books produced in his cause.

This is rather an allegation of a matter of law, and must necessarily be open, even after a definitive sentence, nor will Sir
[298] *Henry Blount* be precluded from any advantage he may make of it before the court of delegates; all courts have a right to enquire of their officers, what is the usual practice of their courts; this is the constant method in the King's Bench, and at trials at *nisi prius*; in 1 *Salk*. 281. it is laid down, that upon an appeal from a definitive sentence, the judges delegates will certainly admit of this very allegation or allegations to the like effect.

The present case is not near so strong, as the instances put by Mr. *Clark* in his *Praxis*, &c. who is clear of opinion, that in the instances he mentions no appeal would lie.

An objection was taken in the arguing of this case, that the *Lord Chancellor*, upon a petition for an appeal, is not to try the merits of the cause; this is undoubtedly true, but then the *Lord Chancellor* must determine, whether an appeal will lie or not, though he will not enter into the merits, or decide whether the judge

judge of the court of chivalry has properly rejected the allegation. *Blount's Case.*

It has been said there can no great mischief ensue, if such a commission should issue out of the court; but what weighs with me is the making a precedent for future applications to Chancery of this kind; for it would be of mischievous consequences to allow of such dilatory appeals, because, as the court of admiralty proceeds by the same law, it would be an authority for such sort of appeals from the interlocutory orders of that court, and would create great expence and delay, and the suitors there are too necessitous for the most part to allow of any affected delays.

For these reasons I am clearly of opinion, that there is no foundation for Sir *Henry Blount*'s petition, and therefore it must be dismissed.

Jones v. *Bougett.*

March the 30th, 1739.

Case 165.

A person aggrieved by, or interested in a sentence in the ecclesiastical court may have a commission of delegates, tho' he was no party to the original suit.

MR. *Bougett* instituted a suit in the ecclesiastical court, upon a contract of marriage, against Mrs. *Ann Jubert*, who pending that suit intermarried with the appellant; a sentence was pronounced in favour of the contract, a child of that marriage was born, and the wife was dead.

Mr. *Jones*, who with the child was very much interested in this sentence, though no party to the original suit, petitioned for a commission of delegates to review the sentence on the statute of the 25 *Hen.* 8.

Upon citing several authorities from the canon and ecclesiastical law, where persons aggrieved by, and interested in a sentence, may have a commission of delegates to review, though no parties to the original suit. A commission was directed.

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CAP. XXII.

Carrier.

February the 23d, 1743.

Snee and *Baxter*, Assignees of *Tollet*, a Bankrupt, Plaintiffs,
Prescot, and others, Defendants.

Vide title *Bankrupt*, *under the Division*, *Rule as to Principal and Factor*.

CAP. XXIII.

Cases.

(A) *Where they are misreported.*
(B) *An Anomalous Case.*
(C) *Cases imperfect, or denied to be Law.*

(A) *Where they are misreported.*

November the 24th, 1738.

Boycot v. *Cotton.*

Vide title *Portion, where the Case of* Cave *v.* Cave, 2 Vern. 508. *is mentioned.*

(B) *An Anomalous Case.*

November the 24th, 1738.

Boycot v. *Cotton.*

Vide title *Portion, where the Case of* Jackson *v.* Farrand, 2 Vern. 424. *is mentioned.*

[300]

(C) *Cases imperfect, or denied to be Law.*

January the 22d, 1753.

Ex parte Coysegame.

Vide title *Bankrupt under the Division, Rule as to Annuities under Commissions of Bankruptcy, where the* obiter *Opinion in* Miles *v.* Williams *and his Wife,* 1 Wms. 255. *is mentioned.*

August the 24th, 1750.

Ex parte King.

Case 166.

IT was said by Mr. *Ord* it was determined in the case of *Pope* v. *Onslow,* 2 *Vern.* 286. where *A.* had two mortgages upon different independent estates of the mortgagor, one a deficient security, and the other more than sufficient: that the mortgagor should not redeem the last, without making good the deficiency of the other security.

The case of *Pope* v. *Onslow,* 2 Vern. 286. very imperfect, and not to be cited for the future, till it has been compared with the Register.

Lord Chancellor said he was not satisfied that this was the established rule of the court, and upon looking into the case above, found it very imperfect, and therefore declared he would not have it cited for the future, till it had been compared with the entry in the Register's office (1), and said farther he was very apt to believe that the tenements were parcel of and held of the manor of *Dale*, and *that* was the reason Lord *Cowper* so determined.

(1) The Editor has not been able to meet with this case in the Register's book. But see *Puresfoy* v. *Puresfoy,* 1 *Vern.* 29. *Shuttleworth* v. *Laywick, ibid.* 245. *Mesgrave* v. *Le Hooke,* 2 *Vern.* 207. *Bromley* v. *Hammond,* 2 *Cha. Ca.* 23.

C A P. XXIV.

Catching Bargain.

June the 18th, 1750.

The Earl of *Chesterfield* and Others, Executors of *John Spencer*, Esq; —— } Plaintiffs.

Sir *Abraham Janssen*, Baronet, —— Defendant.

5 Bac. Ab. 411. S. C.
2 Vez. 125. S. C.
1 Wils. 286. S. C.

Lord Chancellor,

Assisted by { The two Chief Justices, The Master of the Rolls, and Mr. Justice *Burnet*.

Case 167.

The 17th of *May* 1738, defendant paid 5000*l.* to *Spencer*, and the same day took a bond from him in the penalty of 20,000*l.* conditioned for the payment, of 10,000*l.* to the defendant, at or within some short time after the Duchess of *Marlborough*'s death in case *Spencer* should survive her, but not otherwise.

SOME time in the year 1738, the defendant was applied to by Mr. *Backwell* on behalf of Mr. *Spencer*, to advance and lend Mr. *Spencer* 5000*l.* in consideration of which he would give the defendant a security to pay him 10,000*l.* at the death of the late duchess of *Marlborough*, in case Mr. *Spencer* should survive her; the defendant desired he might consider of it, which he did accordingly, and being again applied to, to lend the 5000*l.* on the terms aforesaid, the defendant at last consented thereto, and on the 17th of *May*, 1738, carried the 5000*l.* in bank notes to Mr. *Spencer*, and paid the same to him, who thereupon executed to the defendant a bond dated the same day, in the penalty of 20,000*l.* conditioned for the payment of 10,000*l.* to the defendant, at or within some short time after the Duchess's death, in case Mr. *Spencer* should survive her, but not otherwise.

The Duchess died *Oct.* 18, 1744, and in the month of *December* following, on the defendant's delivering to Mr. *Spencer* the bond to be cancelled, he executed a new one in the penalty of 20,000*l.* conditioned for payment to the defendant of 10,000*l.* with lawful interest, on the 19th of *April* next, and at the same time executed a warrant of attorney to impower judgment to be recorded against him in *B. R.* for the 20,000*l.* which was done accordingly.

The Duchess of *Marlborough* died the 18th of *October* 1744, and in the month of *December* following, on the defendant's delivering to Mr. *Spencer* the bond above mentioned to be cancelled, he executed a new bond, whereby he became bound to the defendant in the penalty of 20,000*l.* conditioned for payment to the defendant of 10,000*l.* with lawful interest on the 19th of *April* then next, and at the same time executed a warrant of attorney to impower a judgment to be recorded against him in the King's Bench, at the defendant's suit, for the said 20,000*l.* on the said bond; the defendant, by virtue of the said warrant of attorney, caused a judgment to be made out on the said bond against Mr. *Spencer*, at the defendant's suit, for the said 20,000*l.* to be recorded in the King's Bench of *Hilary* term next ensuing the date of the said bond.

In *Dec.* 1745, *Spencer* paid defendant 1000*l.* in part and on the 21st of *March* 1000*l.* more.

In the month of *December* 1745, the defendant, by the invitation of Mr. *Spencer*, being with him in his house at *Windsor*,

he,

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he, on the 14th of that month, gave the defendant a bill for 1000 *l.* on *Hoare* and Company, in part of the defendant's debt, and on the 21st of *March* following sent the defendant 1000 *l.* more by his steward.

On the 19th of *June*, 1746, *Spencer* died; but before his death made his will, and after payment of debts *&c.* gave the residue of his personal estate to his son, and appointed plaintiffs his guardians and executors in trust, during his minority.

On the 19th of *June* 1746 Mr. *Spencer* died; but before his death made his will, and, after payment of his debts and legacies, gave all the residue of his personal estate to be at his son's disposal, the present Mr. *Spencer*, provided he left no younger child, and appointed the plaintiffs to be guardians of his son, and also executors in trust for him during his minority.

Bill brought to be relieved against defendant's demand as an unconscionable bargain, and usurious contract.

The court relieved only against the penalty, and judgment, by directing the defendant to deliver up the bond to be cancelled, and to acknowledge satisfaction on the judgment, upon being paid by plaintiffs what should be due at law but would not give him costs, as there was *probabilis causa litigandi*, and defendant's case far from being a favourable one.

The executors of Mr. *Spencer*, finding his specialty debts very considerable, and that such as were upon simple contracts only, which likewise amounted to a very large sum, would receive but little satisfaction through the deficiency of testator's assets, after payment of such sums as were really and *bonâ fide* due on specialties, brought a bill to be relieved against the defendant's demand, as being an unconscionable one, charging that the condition stipulated by his security was absolute, and independent of any other contingency than that of a grandson of 30 years of age surviving a grandmother of 80; and as the period or point of time limited for the payment (which was in one month after the death of the Dutchess) could not, by reason of her great age and infirmities, be removed to any great distance, but was every day approaching, and in fact happened soon after; so the requiring such a large sum as 10,000 *l.* for the forbearance of 5000 *l.* for so short a time, being at the proportion of 200 *l.* for every 100 *l.* was a most unreasonable and *usurious* contract, and such as will never meet with the approbation or countenance of a court of equity, especially where the demand is made upon the assets of an insolvent person, to the prejudice and defeating of his other just and honest creditors, and of an infant heir and residuary legatee, and that the executing a new bond to the defendant, after the death of the Dutchess of *Marlborough*, is only a continuance of the former transactions, and partook of the original fraud, and that being an unrighteous and usurious bargain in the beginning, nothing which was done afterwards could help it, but on the contrary, defendant, in acquiring such new security and judgment, and thereby seeking to conceal the true transaction, did, as far as in him lay, add to the first fraud, and ought to be restrained from taking out execution on his judgment, till the court have first inquired into and determined upon the fraud, and therefore 'tis prayed, that the defendant may be adjudged by the court to be a creditor of Mr. *Spencer* only, for such sums as he shall appear to have *bonâ fide* advanced, with interest from the time of advancing the same, after deducting what he hath received, and that

that he may be decreed to come in, and receive a satisfaction for the residue of such principal sums only and interest, *pari passu* with Mr. *Spencer*'s other creditors, according to the nature of his demand, and for an injunction to stay his proceedings at law till the hearing of the cause.

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July the 21st, 1747, the injunction was continued upon the merits till the hearing.

Mr. *Noel* for the plaintiffs,

The question is, Whether or no the executors are intitled to be relieved, on payment to the defendant of the principal really advanced, and legal interest?

Contracts of this nature can be founded only on two principles, extravagance and distress on the one part, and the exorbitant desire of lucre on the other, and taking advantage of the necessity of the person borrowing.

Mr. *Spencer*, by a riotous course of life, run behind-hand; and it is proved he owed above 20,000l. At this time his chief dependance was on the Dutchess dowager of *Marlborough*, who was then 78 years of age, beyond the common date of man's life, and Mr. *Spencer* himself only 30.

It can bear no doubt but these were the only motives and principles of Mr. *Spencer*'s application, nor any doubt but the view of securing to himself so large a gain on such a probable contingency, were the motives of the defendant; for, to use the words of a great author, it was an abundant shower of *cent. per cent.*

The defendant says it was not of his seeking, but an application on the part of Mr. Spencer, *and that he was a stranger to his person and his affairs*; but, notwithstanding his pretences, he cannot be said to be ignorant from the moment of the proposal to him; for his offering such an exorbitant advantage, spoke stronger than a thousand circumstances, that Mr. *Spencer* was necessitous, a transaction too unequal and enormous to bear the light and therefore the defendant was fixed upon to carry it on with secrecy, for fear, if such a transaction should be publickly known, and come to the ears of the Dutchess of *Marlborough*, it might be prejudicial to his future hopes.

Mr. Spencer *was of an age to dispose thereof, says the defendant, and might act as he thought proper, as he was* sui juris; but notwithstanding this, as the Dutchess of *Marlborough* was alive, and his father and mother dead, she stood *in loco parentis*, and consequently he had a parental dependance on her, and therefore, for fear of her knowing it, he durst not seek a remedy against this iniquitous bargain, because of the risque he run of divulging the secret.

The defendant must know Mr. *Spencer* to be in distress, for a man of affluence and estate could have got money on the common terms, and therefore the proposal itself spoke his situation.

This is become a case of publick concern, as it tends to the ruin of many other families; *but then, says the defendant, consider the risque I run; if it turned out against me, I had lost my money.* When I compare the ages of the persons, one 78, the other 30, 'tis

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'tis a farce to call it a risque; the Dutchess of an age few arrive at, and indeed no one would wish to arrive at. This is certainly not a fair and just transaction, but unequal, and therefore relievable in a court of equity. *But then the defendant says, Mr.* Spencer, *though only thirty years of age, was of a weak and decayed constitution, and therefore there was an equal chance whether he survived the Dutchess of* Marlborough. This was an after-thought, for Mr. *Backwell*, examined for the plaintiff, does not say it was at all considered at the time.

'Tis proved in the cause, that Mr. *Spencer* was then, and some years before, and after, of a robust constitution, prior to his marriage naturally so, but by an improper conduct brought into a decayed state. *But, says the defendant, all these observations are out of the case, as Mr.* Spencer, *after the Dutchess of* Marlborough'*s death gave a new bond, and warrant of attorney to enter judgment, and therefore became a common creditor.*

The original bond was to pay 10,000*l.* if Mr. *Spencer* survived the Dutchess of *Marlborough*. When he gave the second bond, he was not free and at liberty, nor did he know he could be relieved; and this subsequent transaction is, therefore, no confirmation or sanction of the original bargain.

Then, says defendant, it is no fraud. Though it be not so in the particular signification of the word, yet if it be unjust, in its nature exorbitant and extravagant, this court have considered it in the nature of fraud.

I will mention cases of this complexion, in which the court have proceeded on these principles, where a contract has been exorbitant and unequal, and have relieved, though nothing illegal in the case, as where avarice has appeared on the one side, and poverty on the other; and have also taken into their consideration the fatal tendency such cases have, with regard to the publick. There are likewise other cases in which the court has determined a subsequent act shall not establish a contract originally bad.

The case of Sir *Thomas Meers* before Lord *Harcourt*; *there, Sir* Thomas *had, in some mortgages, inserted a covenant, that if the interest was not paid punctually at the day, it should from that time, and so from time to time, be turned into principal, and bear interest. Upon a bill filed, the* Lord Chancellor *relieved the mortgagors against this covenant, as unjust and oppressive* (1). This case is mentioned in *Bosanquet* v. *Dashwood*, before Lord *Talbot*, *Ca. in Eq.* in his time, 40. This, said he, in giving his opinion, is an authority in point, that this court will relieve in cases which (though perhaps strictly legal) bear hard upon one party; the reason is, because all those cases carry somewhat of fraud with them; I do not mean such a fraud as is properly deceit, but such proceedings as lay a particular burden or hardship upon any man: It being the business of this court to relieve in all offences against the law of nature and reason.

(1) So Lord *Offulston* v. Lord *Yarmouth*, 1 *Salk*. 449. *Broadway* v. *Morecraft*, *Mosely*, 247. *Mitford* v. *Featherstonehaugh*, 2 *Vef.* 445. See *Thornhill* v. *Evans*, *post.* 2 vol. 330.

2 Vern.

2 Vern. 121. Wiseman v. Beake, A. *tenant for life, remainder to his first and every other son in tail, remainder to his nephew* B. B. *enters into several statutes to* C. *for payment of ten for one upon the death of* A. *in case he died without issue male in the life of* B. C. *in the life of* A. *brings a bill to compel* B. *either to pay principal and interest, or to be foreclosed of any relief against the bargain.* B. *by his answer declares the bargain fairly made, and intends to abide by it, and that he would seek no relief against it.* A *dies, and* B. *brings a bill against the executor of* C. *and notwithstanding* B.'s *former answer, he is relieved against the bargain, on payment of principal and interest without costs.*

Wiseman was then 40 years of age, a man in business, a proctor in the commons, and yet the bargain was set aside upon general reasons of equity, and publick inconvenience, a stronger confirmation too there, than here, and yet he was relieved.

James v. *Oades*, 2 Vern. 402. there A. *borrowed* 200 l. *of* B. *and gives* B. *a mortgage defeazanced, to be void on* B.'s *paying* A. 40 l. per ann. *for eight years by quarterly payments; the court declared it to be an agreement against conscience, and decreed a redemption on payment of the* 200 l. *with simple interest*, and said, if this should be allowed, it might be carried to nine years, and so on, without any stint or bounds.

So in the present case, if the court should say it would do at 78 years of age, it might as well do at 90, and therefore no limits could be set to it.

The case of *Curwyn* v. *Milner*, *the* 19*th of* June 1731, *before the Lord Chancellor* King, 3d Wms. 292. marginal note. *There an heir of about* 27 *years of age, and who had a commission in the guards, borrowed* 500 l. *on condition to pay* 1000 l. *if he survived his father and father-in-law; but if he died before his father, or father-in-law, the lender to lose the* 500 l. *The heir survived his father and father-in-law, and was relieved, though after he had paid the money, it being for fear of an execution.*

1 Vern. 167, Nott v. Hill. *A purchaser of a reversion from an heir in the life of his father, at an under value was set aside, though if the heir had died before his father, the purchaser would have lost all his money* (1).

It may be said, *Nott's was the case of a young heir, and therefore not like the present*; but that is not the sole reason courts of equity go upon, but on general rules: however, for argument's sake, I will suppose it to be on the first principle, the Dutchess of *Marlborough* may then be considered in *loco parentis*.

The Earl of Ardglasse v. Muschamp, 1 Vern. 237. Thomas *Earl of* Ardglasse *for* 300 l. *in* 1675, *granted to the defendant a rent-charge of* 300 *l.* per ann. *out of lands of* 1000 l. per ann. *to hold to the defendant and his heirs, and to commence from the first* Michaelmas *or* Lady-day *after the Earl's death without issue male, afterwards the Earl settled his estate for* 300 l. *consideration, to the use of himself for life, remainder in tail to all his issue male, remainder*

(1) 1 *Vern.* 271. S. C. 2 *Vern.* 27. S. C. 1 *Eq. Ab.* 275. S. C. 2 *Cha. Ca.* 120. S. C.

in

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[306] *in tail to the plaintiff his uncle, and then the plaintiff and Earl* Thomas *both brought their bill to be relieved against the grant of the rent-charge, as obtained by fraud and practice, after which bill brought the defendant obtained a release of that suit from Earl* Thomas, *and the now Earl's bill was (Earl* Thomas *being dead) to set aside the grant and release, upon payment of* 300 l. *with interest. At the first hearing Lord Keeper* North *doubted it might be too great a violation on contract to set it aside; but upon re-hearing, after some days consideration, he decreed a re-conveyance or release of the rent-charge, and that the same should be set aside, and a perpetual injunction awarded, upon the plaintiff's paying the defendant* 300l. *and interest; and the defendant obtaining a re-hearing afterwards, the Lord Keeper then declared he was fully satisfied with the decree, and that if he were to die presently, he would make it, and so confirmed it.*

Your Lordship observes that after the bill brought for relief, the plaintiff released it, therefore he knew he might be relieved; and on the bill brought by the uncle afterwards, the court relieved notwithstanding the release: for wherever it is a mischief that affects the publick, as the present does, the court will, without regarding what is done by the private parties, relieve.

I have considered this case hitherto as an unreasonable and unconscionable contract, and that the bargain ought to be set aside upon principles of equity, regarding the publick; but I shall now endeavour to shew it is illegal.

Lord *Coke*, in his 3d *Inst. ch.* 70. 151. says, If any person after his death was found guilty of usury, his goods were forfeited to the crown. Thus it stood as an offence at common law, but the statutes have indulged it to such and such points, and yet wherever there is an attempt by a transaction to procure an exorbitant gain, it is certainly illegal, and immaterial whether it falls exactly within the statute of usury, for still there is something unconstitutional and illegal in it.

But I will go further, and insist it is illegal within the statutes of usury themselves.

21 *Jac. c.* 17. *s.* 2. None shall, upon any contract, directly or indirectly, take for the loan of any money, *&c.* above the rate of 8 *l.* for 100 *l.* for one whole year, in pain to forfeit the treble value of the money due, *&c. s.* 5. This law shall not be construed to allow the practice of usury in point of religion or conscience.

Clayton's case, 5 Co. 70. a. *The plaintiff requested* Reighnolds *to lend him* 30 l. *and on communication betwixt them,* Reighnolds *lent* Clayton 30 l. 6 Dec. 34 Eliz. *till the second of* June *following, to pay him for the principal and loan of it* 33 *l. at the said second of* June, *if the son of the obligee be then alive, and if he die before the said day, that then he shall pay him but* 27 l. *which was* 3 l. *less than the principal. Resolved by the whole court, that it was an usurious contract within the statute, for the reason given by* Popham *on* Burton's *case,* 5 Co. 69. *that if it should be out of the statute for the incertainty of the life, the statute would be of little effect.*

I cite this to shew that if bargains were contingent, and a risque run, yet even then they have been held to be usurious.

So

So in the case of *Burton* v. *Downham*, *Cro. Eliz.* 642. where *A.* agreed with *J. S.* to give him 10*l.* for the forbearance of 20*l.* for a year, if *B.*'s son were then alive, it was held to be usury by reason of the corrupt agreement, and *it is the intent makes it so, or not so.* 2 *Anderson* 121. *pl.* 65. S. C. Earl of Chesterfield v. Janssen. [307]

So in *Mason* v. *Abdy*, 3 *Salk.* 390. *the obligor was bound in a bond of* 300 l. *conditioned to pay* 22 l. 10 s. *premium at the end of the first three months after the date*, &c. *and sixpence in the pound, at the end of six months as a further premium, together with the principal itself in case the obligor be then living, but if he dies within that time, the principal to be lost; adjudged this as an usurious contract, because there was a possibility, that the obligor might live so long, and there is an express provision to have the principal again, in* Carthew 67. S.C. *adjudged upon a general demurrer, that this was an usurious contract, and if such contingency of the death of a man in full health, should prevent the usury, contingencies might be extended to the death of two or three more, and so the statute be of little use.*

We have full evidence to shew the circumstances, and situation of health of Mr. *Spencer*, at the time the defendant lent the money, and Mr. *Backwell* examined for the defendant, says that he does not remember that when he applied to the defendant to advance the 5000 *l.* he said any thing of Mr. *Spencer*'s health, or way of living, but on being pressed to do it, said he would consider of it, and consult his brothers about it, and afterwards agreed to lend it.

John Griffiths, a servant of the old Dutchess of *Marlborough*, says, that in 1738, Mr. *Spencer* lay under great necessities for want of money, and did owe several debts to the amount of several thousand pounds; speaks too as to *Spencer*'s expectations from the Dutchess, and as to his concealing his debts, and owning to him that he secreted these affairs from the Dutchess, for fear it should prejudice him in her favour; and hurt him in regard to the hopes he had from her will.

Another witness, *William Loftin*, swears, Mr. *Spencer* was indebted to different persons in or about *May* 1738, in 20,000 *l.* and was not then able to pay them, or any part thereof; and that he took all possible care to prevent the Dutchess's knowing that he was in debt, and likewise to keep all other debts, that he afterwards contracted, secret from her, for fear he should forfeit her kind intentions to him.

It is admitted in the cause, that Mr. *Spencer*, in *May* 1738, was only 30 years of age, and the Dutchess 78.

James Napier who attended Mr. *Spencer* as a surgeon, swears, that in and before *May* 1738, he was not of a broken constitution, nor was his life a precarious one, but very strong and healthy, and that he was likely to live many years, and that five years after this time he had a fever, but got soon well, and from 1736, to 1743. enjoyed perfect health; and *John Griffiths* before mentioned says, that on asking the apothecary who attended him, as to his judgment of the state and condition of Mr. *Spencer*'s health, he said, if *Spencer* could refrain from chewing tobacco, and drinking drams, he might still live a great while, being born with a better

better constitution than most men; and several other persons swear, Mr. *Spencer* enjoyed a good state of health in general, till a few months before his death.

The Dutchess of *Marlborough* died *October* the 18th, 1744, and Mr. *Spencer* *June* the 19th, 1746.

Mr. *Clarke* of the same side.

First, I beg leave to insist that if this contract had been examined into at law, it would have been considered there as an usurious one.

Ever since money has been made the medium of trade and commerce, all civilized governments have laboured to prevent exorbitant gain upon the loan of it.

The statute of the 11 *Hen.* 7. *c.* 8. was the first act that tolerated the taking of interest. By the 21 *Jac.* the courts of law are invested with a kind of equitable jurisdiction, as it requires them to take into their consideration the particular circumstances of the case.

I will lay down the inferences first, before I cite the cases.

First, The intention of parties at the time of the bargain, will have great weight in determining the court, and if it is plainly a loan of money, then *usurious*.

Another principle is, that wherever a security is taken for a larger sum of money than is really advanced, it is usurious, unless the borrower, by doing some collateral act, might be at liberty to pay legal interest.

Another principle is, that the whole sum must be lent, or else within the usurious statutes.

Moore 397. *Beecher*'s case, cited in the case of *Reynolds* v. *Clayton*, as adjudged *in B. R. there B.* delivered wares of the value of 100*l.* and no more, and took a bond with a condition to re-deliver the wares to *B.* within a month, or to pay 120*l.* at the end of a year; the obligation was adjudged void under the statutes of usury.

This rests upon the intent of the bargain, and I mention it to shew what opinion courts of justice had of contingent bargains.

Burton v. *Downham*, *Cro. Eliz.* 642. The intent of this was to have a shift.

Burton's case, 5 *Co.* 69. *Roberts* v. *Tremain*, *Cro. Jac.* 507.

Cottrel v. *Harrington*; *Brownlow* 180. *Fuller*'s case, 4 *Leon.* 208. but care is to be taken, said the court in that case, there be no communication for the loan of money, for *that* will make it usury.

Considering the great number of cases on this head, there has been an extraordinary uniformity of judgment in the judges of the several courts.

Comberb. 125. *Mason* v. *Abdy*, taken notice of by Mr. *Noel* before, but I mention it again for the sake of what Lord Chief Justice *Holt* said very humourously, You do run a great risque indeed, not of the death of the person, but of the loss of your money.

ney. Mr. Justice *Dodderige* said in *Roberts* v. *Tremain*, casualty of interest is usury, but casualty of principal is not. Earl of Chesterfield v. Janssen.

Thus it stands upon the cases; to apply them in their inferences to the present case.

The intention of parties at the time of the bargain, will have great weight in determining the court, and if it is plainly a loan of money, then it is usurious. [309]

The only thing in view here, upon the first communication between the parties, was a borrowing; for Mr. *Backwell* examined for the defendant says, that when he applied to him, he asked him if he would lend Mr. *Spencer* the 5000*l.* on the terms proposed.

The bond itself is a direct security for paying double the sum lent, upon the contingency happening; there is an agreement too, for paying a larger sum than lent; another mark! and criterion!

Mr. *Spencer* could not have delivered himself from paying this sum, by paying a less, because the bond did not put it in his power to do so.

Next, as to that part of the case which is hazardous.

In none of the cases cited, do the court enter into the discussion of the nature of the chance, but reject this, as being any ingredient, for not considering the transaction of the parties as within the act; for if they should give this latitude, in the language of Lord Chief Justices *Popham*, *Holt*, &c. it would be to make the acts of usury mere waste paper.

Next; what ought to be the fate of this bargain, now it comes to be considered in a court of equity.

In the first place, this court will not lay down any express rules, how far they will go in relieving against such bargains, for fear it would teach persons, how far they may safely go, and if there is but a spark of oppression, a court of equity will relieve; courts of equity too will make freer with these bargains, than courts of law will do.

In *Symonds* v. *Cockerill*, *Noy* 151. The court mediated, by obliging the borrower to pay the principal only.

The principles now established, were established with deliberation, and even two of the Judges who doubted of these principles at first, were forced afterwards, from the growth of this evil, to dissent from their former opinions.

1 *Chan. Cas.* 276. *Waller* v. *Dalt*, before Lord *Nottingham*. Waller *a young gentleman and two others, employed one* Willis *to borrow* 500l. Willis *employed* Wiltshire, *who spoke to* Dalt *a silkman, and bought of him silks for* 500l. *The plaintiff gave bond and judgment for the money*, Wiltshire *sold the silks for* 250 l. *and kept* 50 l. *for his and* Willis's *pains, and paid* 200 l. *to the plaintiff: The defendant never treated with the plaintiff, and denied on oath, that he ever treated about the loan of money, and deposed the silks to be of* 500l. *value or thereabouts, but proof was given to the contrary. Decreed only* 200l. *and interest*, (quære, *for the interest*,) *and relief against the defendant* quoad residuum (1).

(1) See *Barker* v. *Vansommer*, 1 *Bro. Cha. Rep.* 149.

 2 *Chan.*

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2 *Chan. Caf.* 136. *Barney* v. *Beak*, Lord Keeper *North* reverfed Lord *Nottingham*'s decree, *as it was a hazardous bargain only, and no proof of fraud*, for coming recently out of a court of law, Lord *North* was at firft ftrictly legal, but afterwards relaxed.

[310] *Berney* v. *Pitt*, 2 *Vern.* 14. *The plaintiff being a young man, and his father tenant for life only of a great eftate, which by his death was to come to the plaintiff as tenant in tail, and allowing the plaintiff but fcantily, he borrowed* 2000 l. *of the defendant in* 1675, *and entered into two judgments of* 5000l. *a-piece, defeafanced each of them, that if the plaintiff outlived his father, and within a month after his death paid the defendant* 5000l. *or if the plaintiff fhould marry in the life-time of his father, then if he fhould from fuch marriage, during his father's life, pay the defendant intereft for his* 5000l. *the defendant fhould vacate the judgment, with this farther claufe in the defeazance, that it was the intent of the parties, if the plaintiff did not outlive his father, that the money fhould not be repaid. In* 1679, *the plaintiff's father died, and to be relieved againft the judgements, upon payment of the* 2000l. *lent, together with intereft, was the bill, which complained of a fraud, and an undue advantage taken of the plaintiff's neceffity, when in ftreights.*

The caufe came firft to be heard in Hilary *term* 27 Car. 2. *before Lord* Nottingham, *who in regard the judgments were for money lent, and not for wares taken up to fell again at an under-value, and in refpect of the exprefs claufe in the defeazance of the defendant's lofing all, if the plaintiff died before the father, did not think fit to relieve the plaintiff againft the bargain itfelf, without paying the* 5000 l. *with intereft from a month after the plaintiff's death.*

The caufe was re-heard before Lord Chancellor Jefferies, *who made no difference in the cafe of an unconfcionable bargain, whether it be for money or wares, and though there was not in this cafe any proof of any practice ufed by the defendant, or any on his behalf, to draw the plaintiff into this fecurity; yet, in regard merely to the unconfcionablenefs of the bargain, he reverfed Lord* Nottingham's *decree, and decreed the defendant* Pitt *to refund to the plaintiff all the money he had received of him, except the* 2000 l. *originally lent, and the intereft for the fame.*

In *Burney* v. *Tifon*, 2 *Vent.* 359. Lord Keeper *North* affirmed Lord *Nottingham*'s decree, but added *a non retrahetur in exemplum*; what feemed to ftick with him, was fetting afide mens bargains.

(a) Ante 305. *Nott* v. *Hill*, 1 *Vern.* 167 (*a*). *This was the cafe of a purchafe of a reverfion from an heir in the life of his father, where if the heir had died before his father, the purchafer would have loft all his money, and yet Lord* Nottingham *upon the firft hearing decreed a redemption, but on a re-hearing, Lord Keeper* Guildford *reverfed it, and Lord Chancellor* Jefferies *reverfed Lord* Guildford's *decree, and confirmed Lord* Nottingham's, *declaring he took* Hill's *purchafe to be an unrighteous bargain in the beginning, and that nothing which happened afterwards could help it.*

Johnfon executor of *Hill* v. *Nott*, 1 *Vern.* 271. *the bill was brought by* Hill's *executor, fetting forth, that the defendant was only*

tenant

tenant in tail, and had covenanted to make further assurance, and prayed he might be compelled to perform his covenant in specie, and be decreed to levy a fine. Lord Keeper Guildford *seemed now to remit from his strict legal notions, for he denied the plaintiff any relief, and said the practice of purchasing from heirs was grown too common, and therefore he would not in any sort countenance it, and dismissed the bill, and left the plaintiff to bring his action of covenant at law.*

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In the Earl of *Ardglasse* v. *Muschamp, Lord* Guildford remitted very clearly from his strict legal notions; *many precedents in the Lord* Elsmere'*s, Lord* Bacon'*s, and Lord* Coventry'*s times and since were produced, whereby it appeared, that unconscionable bargains, which had been made with young heirs, had been set aside by decree of this court, and after some days consideration had, he decreed a reconveyance, and upon a rehearing declared he was fully satisfied in the decree, and made use of this remarkable expression, that if he were to die presently, he would make it, and so confirmed it.*

A series of precedents induced him to give the relief he did.

Bill v. *Price,* 1 *Vern.* 467. *The defendant had for many years practised on young heirs, by selling them goods at extravagant values, and to be paid five for one, and more, upon the death of their fathers, and had obtained from the plaintiff and two other young gentlemen, heirs to good estates, several securities, wherein they were bound severally, and jointly, in* 4000l. *for payment of great sums of money. Lord Chancellor* Jefferies *decreed the plaintiff's security to be delivered up, on payment of what the defendant really and* bona fide *paid him alone, and for his own proper use.*

Lamplugh v. *Smith.* 2 *Vern.* 77. *Wiseman* v. *Beake,* 2 *Vern* 121. before lords commissioners. *James* v. *Oades,* 2 *Vern.* 402 before Sir *John Trevor, Twisleton* v. *Griffiths,* 1 *Wms.* 310. before Lord *Cowper, who grounded his opinion chiefly upon the case of* Berney *v.* Pitt, *and said that Lord* Jefferies'*s decree, standing there shewed that every one thought the same was just, and that there was therefore no attempt in parliament to reverse it.*

Lord Chancellor *King* in *Curwin* v. *Milner,* as well as Lord *North,* tho' strictly legal at first coming to the Seal, determined in this case against the bargain, tho' an exceeding strong one.

I shall mention only one case more with regard to the precariousness of the bargain, *Lawley* v. *Hooper, Nov.* 19, 1745, before your Lordship (1), *The plaintiff a younger son, and intitled to an annuity of* 200l. *a year for life, out of the estate of his elder brother, being involved in debt, and a prisoner in the* Fleet, *and having no other means of delivering himself from a gaol, than by disposing of the whole, or part of the annuity, sold to Mr.* Davenant 150*l. a year, part thereof, for* 1050l. *In the deed there was a proviso, that if at any time the plaintiff should desire to repurchase the said three fourths of the annuity, and should give six months notice to* Davenant *in writing, of his intention so to do, and at the expiration of such notice, pay to* Davenant, *his executors,* &c. 1050*l. then* Davenant *was to re-assign to the plaintiff or his assigns; after this deed was ingrossed, and when all parties were met for the execution,* Davenant

(1) *Post.* 3 vol. 278. S. C.

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insisted upon an indorsement, and to be signed by the plaintiff, that in case he should repurchase the said three fourth parts, the same should be upon payment of 1050 l. *and* 75 l. *and all arrears, which the plaintiff charged he consented to by reason of his distressed circumstances.*

[312] Davenant *being dead, the plaintiff brought his bill for an account of what was due to the defendant for principal and interest of the* 1050 l. *and what defendant had paid for the insurance of the plaintiff's life, which by the bill the plaintiff submits to allow, and that, upon payment of what should be due, the defendant might re-assign the said annuity.*

Your Lordship, upon the circumstances of the case, thought this was, and is to be taken as a loan of money, turned into this shape only, to avoid the statute of usury, and that it ought to be set aside as a sale, and made a security only, and that the plaintiff was intitled to redemption on payment of 1050 *l.* with legal interest for the same.

Thus it stands on the cases; and the rule they go by is the unconscionableness of the bargain, and the inconvenience to the publick, for they speak of it as a growing evil.

These cases, and principles, obviate the objection that, from the answer of the defendant, may be presumed to come from the other side, as that Mr. *Spencer* was not a young heir, nor supposed to be in necessitous circumstances, for he had several thousand pounds a year.

Many of the cases cited, were not determined on the rule of relieving young heirs, particularly the Earl of *Ardglasse* v. *Muschamp* and others.

Mr. *Spencer*'s expectations were as great from the Dutchess of *Marlborough* as if he had been her son, and she might have been considered as a *mater-familias* standing in *loco parentis*, and he as *filius familias*.

A man who has a considerable estate, if his expences exceed his income, is a necessituous man, where he is under difficulties of raising money, and is in great want of it; several witnesses prove the great streights Mr. *Spencer* was in, but this evidence is not the only evidence, for the contract itself speaks it, nor did any of the cases cited require evidence, that he was necessitous: In *Berney* v. *Pitt*, tho' no proof of practice used by the defendant, or any on his behalf, to draw the plaintiff into the security, yet Lord *Jefferies* reversed Lord *Nottingham*'s decree.

Such bargains are always done in secret, and if the court was to require proof extrinsick to the bargain, it would be saying at once we cannot relieve.

I shall consider next, as to what the defendant may insist with regard to the hazard.

The inequality is extremely great, the Dutchess of *Marlborough* was 78 years of age, and Mr. *Spencer* was only 30; there is evidence of his health brought down as low as within ten months of his death, and of his being of a strong constitution for many years before this bargain, his life was insured only in 1744, which could not have been done, if he had been in a bad state of health.

In

In the case of marriage-brocage bonds, the court does not decree for the sake of the plaintiffs, because they may be said to act perfidiously, but to avoid the inconvenience which would otherwise happen to the publick.

The same as to the cases of bonds to women of bad character (1). [313]

The same as to premiums of attorneys, and guardians by clients, and infants after coming to age, *Law* v. *Law*, before Lord *Talbot* (2). *Selwyn* v. *Honeywood*, 20th of *October*, 1743 (3), *Shepley* v. *Woodhouse*, 17th of *March* 1742 (4). *Pierce* v. *Waring*, before Lord *Hardwicke* (5).

On the last point, whether the subsequent acts have established the bargain, the case of *Cole* v. *Gibbons*, 3 *Wms*. 290. is extremely strong in favour of the plaintiff *Cole*. There *A*. having 500*l*. given him by his uncle in case he survived the testator's wife, sells it for 100*l*. to be paid by 5*l*. *per annum*, but that if the testator's wife should die before *A*. and the legacy become due, in such case, the rest of the money is to be paid within a year then next; *A*. does survive the testator's wife, and knows the legacy was become due to him, and being fully apprised of the whole fact, confirms the bargain; he shall be bound *thereby*; and yet Lord *Talbot* said, that, had all depended on the first assignment, he would have set it aside, as being an unreasonable advantage made of a necessitous man. But after *Martin* was fully apprized of every thing, and yet chose to execute a deed of confirmation, and not the least fraud or surprize appearing on the part of the defendant, it was, he said, too much for any court to set all this aside.

There a man was intirely *sui juris*, and did not owe the releasee a groat, and therefore his act was merely voluntary. Here Mr. *Spencer* was indebted to *Janssen* upon bond (the Dutchess of *Marlborough* being dead) for the payment of the money, and therefore was in his power, and the new bond and judgment only a sequel of what was done before, and must be taken to be upon the same circumstances, and as was said in the case of *Berney* v. *Pitt*, is no excuse, but rather an aggravation.

As to the defendant's saying in his answer, that Mr. *Spencer* did not at all want to set aside the bargain, but desired him to get a bond, and judgment, forthwith for the 10,000*l*. he owed him, the case of *Wiseman* v. *Beake*, is very strong.

The prudence and policy of the courts of law and equity here do no more than what other nations have done in the same cases.

Dig. lib. 14. *t.* 6. *lex* 1. *Verba senatusconsulti Macedoniani hæc sunt; ne cui, qui filiofamilias mutuam pecuniam dedisset, etiam post mortem parentes ejus, cujus in potestate fuisset, actio petitioque daretur; ut scirent, qui pessimo exemplo fœnerarent, nullius posse filii-familias bonum nomen expectata patris morte fieri.*

(1) *Post.* 333, notes.
(2) *Ca. Temp. Talb.* 140. 3 *P. W.* 391. S. C.
(3) *Post* 3 vol. 276. S. C.
(4) *Post.* 2 vol. 535. S. C.
(5) 1 *Ves.* 380. S. C.

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Lex 3. *sec.* 3. *Is autem solus senatusconsultum offendit, qui mutuam pecuniam filiofamilias dedit: Nam pecuniæ datio perniciosa parentibus eorum visa est.*

Lex 14. *Etiamsi verbis senatusconsulti filii continerentur, tamen & in persona nepotis idem servari debere.*

June the 19th 1750.

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MR. *Wilbraham* for the plaintiffs made two points. *First*, Whether this is a good contract in point of law?

Secondly, If good in point of law, then, Whether a court of equity can, upon its principles and powers, relieve against this contract?

Our laws allow a certain moderate profit to be taken for money, but if we exceed it by any subterfuge, or what is called a shift, if it be for a loan of money, acts of parliament have rescinded a contract of this kind, tho' it has something of a chance in it.

Lord Chief Justice *Anderson*, in his second report, 15 *pl.* 8. says, Where there is a borrowing of money, and a communication for interest, the devise to have beyond the rate of 10 *per cent.* is fraudulent, and within the 37 *Hen.* 8.

It may be objected in all cases of contingency, where greater than legal interest is taken, these have not been held to be usurious, and bottomree bonds will perhaps be mentioned.

But those are regarded chiefly in respect of trade, and that is their principal foundation of being allowed.

The statute of 21 *Jac.* makes usurious bonds void in as many cases as possible.

The life of a gentleman of thirty is by this contract set against a life of seventy-eight; and a wager, whether that life will last beyond this, must at the first view appear to be greatly for the advantage of the lender: I hope therefore the court will see it in the light of a shift or subterfuge to avoid an act of parliament, made with a good design, and within the meaning or intention of the statutes of usury.

If stopping a commerce of this kind, which is become a growing evil, will be of publick service, it is time for this court to interpose: by these sorts of contracts men pledge their estates before they have them, and before they know the value of them; no one, who has a present power over his fortune, ever makes contracts of this kind. He who has money at interest or in the stocks, he who has a real estate in fee simple, never deals in this way, which shews 'tis the necessity of the case that forces them to have recourse to these methods, and shews too that this sort of commerce must generally be practised by young and unexperienced persons, who have expectations of succeeding to the old.

It is an observation generally true, and a melancholy truth it is, that mankind have not near so much regard to great reversionary inconveniencies as to small present gratifications; young men

men know not how to eftimate what they never felt the benefit of, and by this fort of traffick, their eftates, like their pleafures are gone before they are enjoyed. That this commerce promotes and encourages extravagance, that extravagance in general is contrary to the policy of the law, is not to be difputed, becaufe men fpend not their own, but the eftate of others; for generally, in the ruin of one of thefe great prodigals, a large number of poor creditors are included.

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I admit that againft this fort of extravagance there is no immediate remedy in our law; the *Roman* law put their prodigals under curators, *prodigo interdicitur rerum fuarum adminiftratio*. The magiftrate has no fuch power here, 'tis true; but this fhews the wifdom and utility of the reftraint.

What is the effect of this extravagance? A trade of annuities, of junctims, of *poft obits*, is eftablifhed as a ftaple, to encourage young gentlemen to undue themfelves. This commerce has been exclaimed againft ever fince I knew the world, and mankind have wifhed that fome ftop might be put to it. Whoever engages in thefe fchemes, his ruin is pronounced not far off, and by thefe means they deftroy their eftates, though they fpend but half of them.

How far then this fort of contract may be regulated by a court of equity, is the next confideration.

The law in cafe of ufury refcinds the contract *quoad* the borrower, and gives a forfeiture of treble the value of the loan. This is fevere! A court of equity moderates the cafe, allows the lender the loan, and intereft for it whilft lent (1); but prevents him from receiving that unjuft price, which his avarice had fet upon the rifque he run. Upon thefe principles it is to be confidered, whether this fpecies of contracts is not within the reafoning of other cafes, which bear an analogy to it, and governable by the fame rules.

There are contracts of feveral kinds which are not fuffered to prevail. Marriage-brocage bonds are fet afide, though marriage be fairly procured, though it is a great fervice to the party who gives fuch bond, though the man and woman are both of age, and no difparagement, and though they neither of them difapprove of the marriage. In the cafe of *Hall* v. *Potter*, *Parl. Cafes* 76. the Houfe of Lords, on account of the dangerous confequences to families, reverfed a decree of the Lord Keeper's, who was of opinion not to relieve againft a marriage-brocage bond.

If contracts allowed to be good at law, have been fet afide in equity, becaufe dangerous to families, *a fortiori* they fhould be fo where they are deftructive to families.

The principle on which this court has fet afide contracts with young heirs, is where they have fold their reverfions or remainders, or bound themfelves to pay unreafonable fums on the death of their anceftors.

(1) So 1 *Vef.* 320. 2 *Vef.* 489. 567. 2 *Bro. Cha. Rep.* 648.

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In the case of *Twisleton* v. *Griffiths*, 1 *Wms*. 310. Lord *Cowper* relieved against an agreement to sell a reversion at an under price, *declaring that these bargains were corrupt and fraudulent, and tended to the destruction and ruin of families, and that the relief of the court ought to be extended to meet such corrupt practices, and unconscionable bargains*. And in *Curwin* v. *Milner*, Lord *King* grounded himself on this, *that the court would set aside contracts of this kind, where the person contracting had expectations after the death of another*. And in the case of *Cole* v. *Martin*, 3 *Wms*. 293. Lord *Talbot* said, *That as to the case of young heirs making bargains, it was the policy of the nation to prevent what was a growing mischief to antient families, seducing them from a dependence on their ancestors, and therefore the policy of the nation has thought fit to set aside such bargains with young heirs*.

[316]

This is the general principle, a man if he has any reversion, in effect sells it, and the present case tallies with those I have mentioned, in all the pernicious consequences.

What inconvenience then can arise in putting a stop to this trade? for as it is the same sort of men who are concerned in every one of these contracts, the laying an embargo upon this commerce will not at all hurt the constitution; for they are only fuel to extravagance.

The defendant, in his answer, *objects the plaintiffs are not intitled to relief, because there is no pretence of fraud*.

I do not say there is any, but public inconvenience alone may induce the court to interfere, though there is no apparent fraud.

It is insisted too Mr. Spencer *was not a young heir, for he was thirty*; but although of that age, yet not old enough to manage his fortune, so as to keep within bounds.

Mr. *Twisleton* was 34 at the time his contract was made, and yet the court did relieve him notwithstanding.

Though it be true Mr. *Spencer* was no heir to the Dutchess of *Marlborough*, yet from her constant declarations he was looked upon to be *quasi* her adopted heir; the defendant considered him as such, else why should he be more able to pay at her death than at any other period? So that he was *quasi hæres*, and as an heir has only a ground of expectation, if Mr. *Spencer* had the same, that is a foundation for a court of equity to relieve.

Mr. *Spencer* was indisputably the sole favourite the Dutchess of *Marlborough* had; her common expression was, *Jack is no beau, nor is he a courtier, but he is an honest man*. I never was but four times in her company, and yet I heard her make this observation every time.

The next objection, that Mr. Spencer *was not under those necessities that persons generally are, who enter into these sort of contracts, and that this is the main ingredient in the relief given in cases of this nature*.

But the fact is clearly otherwise; he who has a great estate, but lives at double his income, who has a multitude of footmen at his gates, but more duns, is poor, is under pressing necessities; it is proved that Mr. *Spencer* owed in 1738 above 20,000*l*. and

was under the greatest difficulties; and is not the evidence of Mr. *Backwell*, that he had hawked this proposal about, the strongest proof of his extreme necessities? Whoever suffered a traffick of this kind to be made publick, unless he was necessitous? Did he not run a much greater risque than the defendant? Did he not risque his whole expectations? He may be said to be poor who is in debt, and cannot pay; nor do I know an instance of a person's granting a *post obit*, without his being reduced first to the greatest extremity. Earl of Chesterfield v. Janssen.

The last objection is, that Mr. Spencer, *though he lived a year and eight months after the death of the dutchess, yet he never thought proper to seek relief against it, but on the contrary ratified the bargain.* [317]

As to Mr. *Spencer*'s not seeking relief against it, it is no wonder, this was in the nature of a debt of honour, a debt depending on chance, and the false notion of honour which prevails in the world, would engage a man to pay this sort of debt, whilst the poor creditor who furnished him with the very bread he eats, is turned away without a penny.

Mr. *Spencer* had not a sum of money left him under the will of the dutchess of *Marlborough*, but only a large investment to be laid out in land, so that here was an immediate payment to be made to the defendant, and no personal assets to answer it, and though the rents of his estate were great, and with good œconomy might have cleared him, yet there must have been a length of time first.

I use these arguments to shew, Mr. *Spencer* was under the same pressure he was before, with this aggravation, the debt was become greater, and no money could be raised off his estate, but by rents and profits.

I do not throw out any thing against the person of the defendant, I only press the relief in this case, for the sake of Mr. *Spencer*'s tradesmen, who as they are only simple contract creditors, have no chance of being paid any other way.

I lay it down as a rule, that this species of traffick is a publick inconvenience, and as it grows into a trade and commerce, I know of no method but the application to this court to remedy it, for it is of such a complicated nature, that even the legislature cannot help it; and therefore as this court can only meet the mischief, we hope they will give their assistance to put a stop to it, and relieve upon the terms prayed by the bill, on paying the money *really* lent only.

Mr. *Crowle* of the same side.

The question in this cause is in fact between the butcher, baker, poulterer, and other tradesmen of Mr. *Spencer*, and the usurer.

The relief that is prayed by this bill, never prayed before in any bill, that this contract should be set aside *here* for usury.

But the defendant insists this contract is not illegal, nor usurious.

From the 27 *C.* 2. to this time, there are not above two determinations at law on usurious contracts, and the reason is, this

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this court have under the notion of frauds taken cognizance of these cases.

Draper v. *Dean* and *Jason*, *Finch's Rep.* 439. *The plaintiff lent Sir* Robert Jason 1000l. *who for securing the repayment thereof with interest, mortgaged the lands in the bill mentioned, and afterwards the defendant* Dean *set up some prior incumbrances to defeat the mortgage, and particularly a statute of* 5000l. *against which the plaintiff now exhibited his bill to be relieved, for that the defendant* Dean *having furnished Sir* Robert Jason *in his father's life time with goods, and with five horses, valued the same at* 2500l. *for which this statute was given, but that the horses and goods were afterwards sold by Sir* Robert Jason *for* 280l. *which was the utmost value thereof. The court declared this to be a case of great hardship, and that dealings of this nature ought to be discouraged, and that if Sir* Robertt Jason *had been the plaintiff, he might have been relieved: however they decreed an account, and to compute what was due to* Dean *for horses and goods, and the real value thereof to be sold, at the respective times when the same were sold and delivered, with interest from such time, and on payment thereof, the statute to be vacated* (1).

[318]

Here was a most corrupt scandalous agreement, and one would have thought they could not miss the statutes of usury, in a case undoubtedly within them, and yet not insisted upon.

Ld. *King* in the case of *Curwin* v. *Milner*, might very well doubt whether he could give relief, because, tho' they argued very prettily on the circumstances, and fraud in the case, that was not sufficient to satisfy him; but if he had happened to fix upon the steady basis of the statutes of usury, he would have decreed upon an unshaken foundation.

I will consider the case next upon the statutes of usury, and whether this is not such a shift or device as is within the statutes, a shift to avoid and evade them.

The preamble to the 37 *H.* 8. *c.* 9. says, *Where before this time divers acts have been ordained for the avoiding and punishment of usury, and of other corrupt bargains, shifts, and chevisances, which acts have been so obscure, as to be of little force or effect; for reformation thereof, Be it enacted, That all and every the said acts shall from henceforth be utterly void.*

The third section is, *That no person of what estate, degree, quality or condition soever, by way or mean of any corrupt bargain, loan, exchange, chevisance, shift, or interest, of any waies,* &c. *or by any other corrupt or deceitful way, or means, or by any covin, engine, or deceitful way or conveyance, shall have, receive, accept, or take in lucre or gain, for the forbearing, or giving day of payment, of one whole year, of or for his or their money,* &c. *above the sum of* 10l. *in the hundred.*

The fifth section, *If any person shall do any thing contrary to this statute, he shall forfeit the treble value of the wares, and other things sold,* &c.

(1) See *Waller* v. *Dalt*, 1 *Cha. Ca.* 276. *Barker* v. *Vansommer*, 1 *Bro. Cha. Rep.* 149.

This

This was the first statute that allowed any lucrative interest, the confirming statute of the 13 *Eliz. ch.* 8. makes 37 *H.* 8. perpetual. Earl of Chesterfield v. Janssen.

Then comes the 21 *Jac.* 1. *c.* 17. *s.* 2. "No person shall "take for loan of monies, above eight for a hundred for one "year, &c."

Every shift, device, &c. to evade the statute of usury falls within this statute.

The question is, Whether, at the time of this contract, Mr. *Janssen* did not mean to secure himself a larger interest than the statutes allow, if he did, it is a void bargain.

The *cotemporanea expositio* is properly laid down to have the most weight, and the judges, at that time, were some of the greatest men that ever filled the Bench. [319]

In *Clayton*'s case, 5 *Co.* 70. it is said, every device, shift, &c. where there is an agreement or communication for loan of money is within the statute of usury. The concurrent opinion of the King's Bench, Common Pleas, and Court of Exchequer, that *Clayton*'s case is a right determination, and the judgment there within 12 years after making the statute of *Elizabeth*.

Cro. Eliz. 643. *Button* v. *Downham*, a *mistake or omission in the state of this case*; *but Lutw.* 469. in *Mason* v. *Fulwood* has rectified the error; for speaking of *Button* v. *Downham*'s case, he says, *I have seen the entry in the roll, by which it appears that as well the interest as the principal was in hazard, though it does not so appear in the books where this case is reported.*

Bottomry is not a communication for the loan of money, but a partnership for the honest intention of seeking a livelihood by trade, and a plain distinction in *Hardres* 418. The case of *Joy* v. *Kent*, an action of *debt upon an obligation, conditioned to pay so much money, if such a ship returned within six months, from* Ostend *in* Flanders *to* London, *which was more, by the third part, than the legal interest of the money, and if she do not return, then the obligation to be void. The defendant pleaded it was a corrupt agreement, and that the obligation was entred into by covin, to evade the statute of usury, and the penalty thereof. Lord Chief Baron* Hale *held clearly, this bond is not within the statute, for this is the common way of insurance, and if this were void, said he, by the statute of usury, trade would be destroyed, and not like the case, where the condition of a bond is to give so much money, if such or such a person be then alive, for there is a certainty of that at the time; but it is uncertain, and a casualty, whether such a ship shall ever return.*

Fuller's case the 29 *Eliz.* a grant of an annuity, not within the statute, *for no communication of loan.*

Bedingfield's case, the 42 *Eliz.* the principal there supposed to be risqued. *Noy* 151. *Symmonds* v. *Cockerill*, 9 *Jac.* 1. *A rent-charge of* 20l. per ann. *for* 100l. *for eight years on a contingency, yet usury, if on loan, tho' principal in hazard.*

Roberts *v.* Tremain, 14 *Jac.* 1. *held usury though on contingency.*

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King v. Drury, 2 Lev. 17. *No usury where in the power of grantor to avoid.*

Grange v. Swain, 3 *Jac.* 2. *Principal in hazard*, Lutw. 464.

Mason v. Fulwood, *Lutw.* 469. *Principal also in hazard.*

Mason v. Abdy, 3 *Salk.* 390. *Principal there also in hazard.*

(a) Sir Dudley Ryder.

Mr. Attorney General (a) for the defendant.

The counsel for the plaintiff would, in the first place, set aside this contract as usurious, and if not void at law as usurious, yet it is insisted ought to be set aside in equity, as improper and unconscionable.

[320] It is in vain to lay down a rule to restrain every man, and every family from ruin, while the law allows every person to be *sane*, till by his crime or his contract, he ceases to be so.

As to the first point they have been pleased to make *of legal usury*, it's novelty does not recommend it much.

The notion of usury originally was the taking any sort of præmium, for the loan of money; but as the law stands now, it is taking an illegal præmium only; the statutes forbid a higher præmium than the legal interest.

The statute of the 21 *Jac.* 1. *c.* 17. *s.* 2. *None shall upon any contract, directly or indirectly, take for the loan of any money, or other commodities, above the rate of* 8 l. *for* 100 l. *for one whole year, in pain to forfeit the treble value of the money, or other things lent.*

In order to make it usury, there must be *a loan* of money, which money is also to be repaid, and there must be a præmium for the loan of that money more than 5 *per cent.*

Nor shall any artificial contrivance whatever evade the statute, and if this contract is a colourable agreement only, to avoid the statutes of usury, and is really a communication for the loan of money, it is within the statutes.

But this is no contract for a debt due, when it depends upon a contingency that may never happen.

Serj. *Hawkins's Pleas of the Crown, book* 1. *ch.* 82. of Usury, *sec.* 16. "No contract is usurious, by which the lender runs "the hazard of losing all his money, both principal and interest, "as in the case of *bottomry*."

Cro. Eliz. Bedinfield *v.* Ashley, A. *delivered to* B. 100 l. *who by indenture covenanted with* A. *to pay to every one of* A's *children, which then were, and should be living at ten years end,* 80 l. A. *having then five daughters, and for assurance mortgaged a manor, and was bound in a statute of* 500 l. *it is not usury, but a mere casual bargain.*

I mention the case of *Roberts* v. *Tremain, Cro. Jac.* 507. for the sake of Mr. Justice *Dodderidge*'s observation. If, said he, I lend 100 *l.* to have 120 *l.* at the years end, upon a casualty; if the casualty goes to the interest only, and not to the principal, it it is usury, for the party is sure to have the principal again, come what will; but *if the interest and principal are both in hazard*, it is not then usury.

Cro. Jac. 208. Sharpley *v.* Hurrel. *A ship going in the fishing trade to* Newfoundland, (*which voyage must be performed in eight months*), *the plaintiff gave the defendant* 50 l. *to repay* 60 l. *upon*

upon the return of the ship to Dartmouth, *and if by leakage or tempest she should not return in eight months, then to pay the principal money* (viz. 50l.) *only, and if she never returned, then he should pay nothing. All the court held, that this is no usury within the statute, for if the ship had staid at* Newfoundland, *two or three years, he was to pay but* 60l. *upon the return of the ship, and if she never returned, then nothing; so as the plaintiff run a hazard of having less than the interest, which the law allows, and possibly neither principal nor interest.* Earl of Chesterfield v. Janssen.

It is not within the statute, because no debt, till the accident happened of the ship's return, as both principal and interest were hazarded. [321]

The distinction, Wherever the contract on the loan of money is upon a contingency, *that is colourable or so slight*, as is contrived merely to avoid the statute, the statute shall have its effect; when this ground is applied to the cases cited on the other side, it will overturn the consequence they draw from them to the present case.

The agreement must be corupt, or it will not be usurious.

Reynolds v. *Clayton*, *Mo.* 397. the ground the court went on clearly was the original contract, being really for a loan of money, and the fact in that case a mere evasion to avoid its being a loan.

Cro. Eliz. 643. *Button* v. *Downham.* It is the intent that makes it so or not, for if it is a wager, it is not usury: every contract which is a real contingency, is a wager; and is not done merely colourable to avoid the statute.

Cotterell v. *Harrington*, *Brownlow* 180. *A.* for 110*l.* granted a rent of 20*l.* for eight years, and another of 20*l.* a year for two years, if *B. C.* and *D.* should so long live. In replevin the defendant avowed for the rent, and the plaintiff pleaded the statute of usury, and set forth the statute and a special usurious contract; said in this case, If it had been laid to be upon a loan of money, then it was usury; but if it be a bargain for an annuity, it is no usury, but that this was alledged to be upon a lending.

Fuller's case, 4 *Leon.* 208. *A.* gives 300*l.* to *B.* to have an annuity of 50*l.* assured to him for 100 years, if *A.* and his wife and four of his children shall so long live. *Per Cur.*' this is not within the statute of usury; so if there had not been any condition. But care is to be taken that there be no communication of borrowing any money before.

Mason v. *Abdy*, in *Show. Rep.* Lord Chief Justice *Holt* said in that case, *that a dying in six months was no hazard, and therefore usurious.* This is very material for my argument, because it implies strongly, if it had been a real hazard, it had been no usury.

A bottomry bond is admitted by the other side to be a hazardous contract, but said not to be within the statute, because allowed for the sake of trade.

I do

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I do not take this to be the reaſon, the true ground of the allowance in courts of juſtice: the lender is to be paid for a *bona fide* riſque, and all turns upon this, whether a colourable contract to avoid the ſtatute.

In the caſe of *Joy* v. *Kent*, in *Hard. the bottomry contract* was put upon the ſame footing with other contingent contracts, and within former caſes, *becauſe it was merely* colourable.

The true point therefore on which the preſent caſe muſt turn is whether the contract between Mr. *Spencer* and the defendant was for the loan of money, and whether more intereſt was originally meant to be taken than legal, and if merely colourable,
[322] and a device to avoid the ſtatute?

Firſt, The contract here, upon the face of it, is not a contract for any thing, but merely a contingent bargain.

Secondly, Nothing that can ſhew it to be otherwiſe, either from the circumſtances of Mr. *Spencer* at the time, or the light he ſtood in with regard to the Dutcheſs of *Marlborough*.

No pretence that the defendant made any agreement he ſhould have the 10,000*l.* on any other contingency, but Mr. *Spencer's* ſurviving the Dutcheſs of *Malborough*.

It is objected that this is a loan, becauſe the word *lend* is made uſe of by Mr. *Spencer* to Mr. *Backwell*.

The word *loan* makes no difference; it is a communication only between the parties on a corrupt agreement to avoid the ſtatute, upon which it turns. The word *borrow* here makes no difference, for ſuppoſing he had ſaid *to ſell*, this court would equally have judged whether it was uſury, and it muſt be the *bonâ fide* intention of the party advancing muſt determine the nature.

As the defendant took it altogether upon the contingency, I will now conſider the nature of the contingency, which is ſaid to be ſo totally diſproportionate, *Spencer* being only 30, and the Dutcheſs 78 years of age; and on this account ſo glaring, that it muſt be a groſs fraud and impoſition.

Mr. *Spencer*, as is proved in the cauſe, was at that time of a bad conſtitution, according to the judgment of perſons experienced in theſe things, broken by an intemperance with women, an intemperance in wine, and an obſtinate continuance in it, and when he was told it, ſaid *I deſire to live no longer than while I am capable of following this courſe of life*. The Dutcheſs of *Marlborough* indeed was 78 years old, but in point of conſtitution extremely likely to live many years; and ſuppoſing Mr. *Spencer* was underſtood then to be in a conſumption, and known to be ſo in the opinion of eminent phyſicians, will *your Lordſhip* ſay this contract was ſo very diſproportionate? But we do not go upon mere ſuppoſition, for he actually died in ten months time after the Dutcheſs, not in a common way, but with a broken conſtitution.

Upon a computation at the time this money became due, intereſt upon intereſt, and inſurance at 5 *per cent.* only, brings it to 9630*l.* ſo that if the Dutcheſs of *Marlborough* had lived ſix months

months longer, the defendant would have been a loser, and this too upon a supposition the defendant could have insured at 5 *per cent.* but no evidence he could have done it at this rate. Earl of Chesterfield v. Janssen.

Lord *Mountfort*, who has been examined, and understands these things extremely well, said in *May* 1738, he looked upon Mr. *Spencer*'s life to be so bad, he would not advance money on any terms; no body therefore besides the defendant would have advanced any money upon this contingency.

Having stated thus much, I will now come to the next point, the consideration of the case as it stands on the foot of equity.

I will first consider it on the original contract, and secondly on the acts that have been done to confirm it, and hope to shew it was a fair bargain in the beginning, or if not so, Mr. *Spencer*, who could give up this advantage, has done it by subsequent acts.

The general principle laid down on the other side, that this is an unconscionable bargain, is from the manner of obtaining it. The last consideration is, whether it be such a contract as, independent of fraud, iniquity, and unfairness, ought, for the publick good, to be set aside? [323]

The defendant at the time was a total stranger to Mr. *Spencer*, so sworn by himself in his answer, and no evidence to the contrary, in no shape whatever a person who has been looking out for young gentlemen to draw them into schemes of this kind, not of the defendant's seeking, but sought out by Mr. *Backwell*, Mr. *Spencer*'s agent. He did not look upon it as a beneficial bargain, but absolutely refused it, and was pressed to accept it.

It is not pretended Mr. *Spencer* was a weak man, or liable to be imposed upon; nay more, they do not so much as charge imposition in their bill: not a young man, not under the care of a parent, married, not wanting an estate, had then very near 8000 *l.* a year in land, 2000 *l. per ann.* long annuities, 10,000 *l.* settled on his marriage, an interest in it to himself for life, at least 400 *l.* a year more, a leasehold estate of 120 *l.* a contingent interest in the sum of 30,000 *l.* which was left to the Countess of *Sunderland* by her husband, with a power to dispose among such of his children as she should think fit, a great personal estate in furniture, pictures, *&c.* besides.

What then was his necessity?

He wanted this sum to pay tradesmen only. It is proved in the cause, he hated gaming, and never lost 100 *l.* at any one time in his life; it proceeded from an honest principle to pay debts, and if he had advised with his best friends (I do not mean lawyers), and had stated how his affairs were situated, and there was no other way of raising it, would his friends, or even the law say, You shall not raise it, because you can only do it in this way?

It is objected, *he is a young heir, and compared to several cases, and therefore, said Mr.* Clarke, *here is now a general rule or principle on which this court can determine it to be a void contract.* But I see no such inference as he endeavours to draw from it. *It is*

 said

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said too there was a person who in 1743 insured Mr. Spencer's *life at 5* per cent.

This was not a publick office but only an under-writer, who might not know the state of his health, for they are not very cautious in insuring; we shall shew an application to the royal insurance office, and they would not insure his life at all.

There is not any one of the cases but what will turn upon this principle, that there was *fraud and imposition*, and if no actual fraud here, nor implied presumptive fraud, there is no ground to relieve upon. The very foundation the common law goes upon to get rid of the statute *de donis*, and for which the fiction of a common recovery is introduced, was for the sake of a man's being impowered to pay his debts.

It is said Mr. *Spencer* had very great expectations.

[324] And yet the will, under which he took, was not in being at the time of this bargain, but was made several years after.

I shall now take notice of the cases cited for the plaintiffs.

Waller v. *Dalt*, 1 *Ch. Cas.* 276. The court relieved there upon a very gross imposition, and was even within the statute of usury.

Berney v. *Beak*, 2 *Ch. Cas.* 136. It was determined likewise for the same reason; there wine was palmed upon the plaintiff, when he wanted money, valued too at 700*l.* and sold for 360*l.* only.

Berney v. *Tison*, 2 *Ventr.* 369. there was also a gross fraud.

Batty v. *Loyd*, 1 *Vern.* 141. the reason Lord Keeper *North* gives at the end, makes it a material case for the defendant; *this said he, is the common case; pay me double interest during my life and you shall have the principal after my decease.*

Because persons apply for money, and cannot get it just on the terms they would wish, that is no reason for a court of equity to interpose.

Nott v. *Hill*, 1 *Vern.* 167. the court relieved there, because it was an unrighteous bargain in the beginning, and nothing afterwards could help it, and did not go at all upon the contingency.

The earl of *Ardglasse* v. *Muschamp*, 1 *Vern.* 75, 135, 237. a most extravagant imposition in that case.

Bill *v.* Price, 1 Vern. 467. *went altogether upon imposing extravagantly on young men, by taking five for one.*

James *v.* Oades, 2 Vern. 402. *set aside because against conscience, not because contingent.*

Twisleton *v.* Griffith, 1 Wms. 310. *the court relieved, because this was the case of an heir who was less upon his guard, by being seduced from his parents; and was besides a growing evil, an imposition too by a person under a pretence of friendship, by getting him from his father.*

Berney v. *Pitt*, 2 *Vern.* 14. the court there went merely upon the unconscionableness of the bargain, which shews they considered it as fraudulent, and therefore these cases amount to no more than relieving against fraud.

Mr. *Clark*

Mr. *Clark* concluded, that the court would consider the nature of the bargain, and determine upon reasons of publick inconvenience; but Mr. *Wilbraham* said rightly, no certain rule can be laid down, because that rule itself would be attended with dangerous consequences, when applied to other cases, and that even the legislature could not reach it, and if so, it is strange to say this court can meet the mischief, — Earl of Chesterfield v. Janssen.

——————pudet hæc opprobria nobis,
Et dici potuisse, et non potuisse refelli.

It is said, wherever there is a private clandestine contract or marriage, contrary to the original proper contract, the court will relieve the very *particeps criminis.*

But the ground the court goes upon there, is, that there cannot be such a case without fraud in it, and wherever there is a fraud, it is impossible to put a case in which the court will not relieve.

Another case has been put of attorneys, while their clients are in distress, and in those circumstances prevailing upon them to enter into an unconscionable agreement, as in the case of *Japhet Crooke,* (*a*) where your Lordship relieved on the second hearing, tho' on the first, you doubted whether you could do it. [325]

(*a*) Post. 334.

But in this case, though the party had paid the money to an attorney, the court will relieve upon general principles, his being supposed to be more knowing than his client, and therefore made the contract with his eyes open.

A man may contract on a future contingency, a mere possibility: I am considering then upon what general grounds your Lordship will proceed. Will the court lay it down for a rule that Mr. *Spencer* could not have disposed of a contingency on the death of father and mother, or grandmother? Will the court say, that a man shall not dispose of an expectation? The case of *Hobson* v. *Trevor*, 2 *Wms.* 191. is a strong authority, to shew that a contingent or hazardous bargain, will be decreed in specie in equity.

A man cannot at law sell an interest in an estate, but he may contract, and judges have been *astuti*, as Lord *Hobart* said in another case, by introducing common recoveries to give people a power, for the sake of the publick convenience, to dispose of a reversionary interest.

In every case, where it is necessary, a court of equity will relieve, and if they do not, I will venture to say, it is not such a case as is really and substantially necessary: but if your Lordship should determine in the manner the plaintiff's counsel desire, it would be determining, that a person, in the same situation with Mr. *Spencer*, cannot for the best purpose in the world, *the payment of debts*, enter into such a contract.

I shall consider next the point of confirmation by subsequent acts.

My first position is, that Mr. *Spencer had a right to release any demands he had upon another.*

He has not only ratified it, but established it upon terms, though I will allow at the same time, this judgment, as well as

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any other contract, is capable of being set aside: but then it must be upon the original contract being founded in fraud.

It is objected, that at the time of the latter transaction, he was under the same necessity.

This is clearly contradicted in evidence. It is said too, he was under the pressure of debts, but is that a reason for setting aside every particular contract; the judgment here given in the freest manner: Mr. *Spencer* himself sent for Sir *Abraham Janssen*, nor is there even a suspicion, Mr. *Spencer* thought the defendant had done any thing contrary to the nicest notions of honour.

Lord *Talbot* in the case of *Cole* v. *Gibbons*, 3 *Wms*. 290. said, he could not relieve, because the person there, after being fully apprized of every thing, executed a deed of confirmation of the former assignment.

[326] The impossibility of Mr. *Spencer*'s being imposed upon at the time he confirmed the bargain, is the stongest circumstance that can possibly be in our favour.

In the case of *Standard* v. *Medcalf*, which came first before Lord *Talbot*, and afterwards went up into the house of Lords, his Lordship thought it a fraudulent transaction, and said, if it depended only on the settlement, he would have relieved, but the will takes off from it, because she has done that voluntarily, and shews the fairness of the former contract: the present is a much stronger case, for there was nothing fraudulent in the original transaction, and therefore a voluntary confirmation will have still the greater weight with the court.

(a) Mr. Murray.

Mr. Solicitor General (a) for the defendant.

The first question is, Whether the bond, taken as it stood originally, was a void bond at law, by reason of the statutes of usury, and if it was, I would not take up the time of the court in arguing on the subsequent transactions.

The second question is, Whether, on the head of equity, this court can set aside a legal contract on the ground of the defendant having acted unconscionably.

If both these are against the plaintiffs,

A third question *has been made*, that supposing it to be good in law, and in conscience, whether the court shall not set it aside on political reasons.

I will endeavour to shew hereafter, why such a ground of determination is impossible in this court, but at present beg leave to insist, this is as honest, as fair, and conscientious a bargain as could be made of the contingent kind.

First, I shall take notice of the circumstances, character, and situation of life of the obligor.

Secondly, The same as to the obligee.

Thirdly, The motive, or reasonableness of it, under his situation then, to solicit such a bargain.

Fourthly, The manner in which it was proposed, and brought to a conclusion.

Fifthly,

Fifthly, The fairneſs and equity of the price, according to the probability at the time, and the event which has happened ſince. Earl of Chesterfield v. Janssen.

Sixthly, The opinion Mr. *Spencer* had of it, in his private thoughts, even down to the laſt moment of his life.

First, As to circumſtances, which are always material in theſe caſes.

As to Mr. *Spencer*'s underſtanding, he is not charged by the bill to be weak, nor likely to be impoſed upon, nor that he was impoſed upon.

Mr. *Spencer* was then turned of 30, no heir of any ſort, at that time had no father, but was himſelf the father of a family; was in no ſtate of diſobedience with grandmother, uncle, or any other relation; never gamed in any part of his life; never loſt 300 *l.* in his life, put it all together. [327]

It is material, that he had then taken up, and was grown more temperate.

Another ſort of circumſtance is, that of fortune.

Poſſeſſed of a fine family ſeat, park, &c. an eſtate in land of 5000 *l.* a year, had the intereſt of 10,000 *l.* reverſion to himſelf in fee for want of younger children, and he had no younger children, had a right in 2000 *l.* exchequer annuities, a chance in a ſum of 30,000 *l.* a hope or expectation from the dutcheſs of *Marlborough*; he had plate, jewels, &c. fit for his rank; ſo that beſides his perſonal eſtate, and his expectations from the dutcheſs, he had at that time 7500 *l.* a year for life.

He was a younger brother, and a commoner, and yet had 3000 *l.* a year more than the eſtate of the family had ever been, to ſupport the honour and title.

From all the evidence in the cauſe, he was addicted to women and wine, but reclaimed two years before he entred into this bargain.

People have as many ways of running out, as getting eſtates, unaccountable how: He had contracted 20,000 *l.* debts, and debts to tradeſmen, as is inſiſted on our ſide; the witneſſes ſwear that he was preſſed by tradeſmen, and that the debts amounted to this ſum.

The plaintiffs ſhould have adapted their interrogatories to this point, who was he indebted to?

Thirdly, The motive, or reaſonableneſs of it, &c.

He might very properly ſay, juſtice obliges me to pay them; it is ſcandalous not to pay them; it debaſes a man of figure and fortune.

Another motive was, that the clamour might not reach the ears of the dutcheſs of *Marlborough*.

Could he have had the aſſiſtance of all his relations, nay if he had had the honour and happineſs of conſulting your Lordſhip, attended as you are, could he have been better adviſed in his ſituation?

He muſt have done it by ſelling his reverſion, and chance on the death of the dutcheſs, either on ſingle or junctim annuities.

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No man would have advised him to sell his personal estate, family pictures, jewels, &c. This is disgraceful, and would have been rejected by the whole family.

Could he have paid it out of the annual profits of his estate, how must he live in the mean time? Besides, the clamour of tradesmen would have continued, for they would not have stayed till the money was raised in this manner.

But why should he, at the age of 30, pinch for the sake of a son, who, at 21, will be master of 30,000 *l.* a year.

The next consideration is, the point of a single or junctim annuity.

Whoever wants such a contract must pay for it. If a man sells an annuity for his own life, the price of middle age and good health never exceeds above seven years; but if the same man wants to buy, he gives 14 years, 15, and in one case,
[328] proved in the cause to have happened in 1743, sixteen or seventeen years. If the life is a bad one, he is made to abate in proportion; take it at the common price, he must have paid 1000 *l.* a year for 7000 *l.* at the best.

These reasons would have dissuaded him from dealing in annuities.

Should he have sold his reversion?

There was a chance of his having another son, nay, his son's marrying under age, and having a son.

Could he have sold the chance under Lord *Sunderland*'s will?

He could not have sold it for any thing; and yet he had a chance, if lady *Sunderland* died without appointment, or should make a void one; and a bill is now depending here, whether *the appointment* she has made is good.

One thing more left, the hope from the dutchess of *Marlborough*.

It has been said, that from the hatred of the dutchess of *Marlborough*, as well as her love, he had almost a certainty of very great advantages.

Suppose he had said, I will live frugally for the future, and pay my debts with money raised out of my income, rather than mortgage my expectations; I should have thought his reasons just; but still if he had not taken this method, would he not have been liable to an execution? where the finest pictures sell by the yard, besides the infamy of it.

These being his circumstances, the next consideration is as to the *circumstances* of the defendant.

No charge in the bill, either as to his condition, character, or manner of dealing; if he had made another bargain of the same kind, it was material to have charged it; he was not personally acquainted with *Spencer*, was no companion in any extravagance that might create the debt, nor did he partake of it afterwards by living with him: He cannot therefore be said to be a devourer, and to be lying in wait for that purpose: Is his property then to be taken from him, *because there may be such a man?* His character in every respect stands clear and unimpeached.

When



When Mr. *Spencer* had engaged so far as to desire a bargain of this sort, *he forms himself* what he thinks the fair price, and was not haggled into it. Afterwards, by his friends and agents he proposes to any one who would buy it, and was refused by several persons, because it was not an advantageous one. Earl of Chesterfield v. Janssen.

Fourthly, The manner in which it was proposed, and brought to a conclusion.

The offer sent to Sir *Abraham Janssen*, and proposed in the first moment, as a conditional bargain: in one event a certain loss, in another a very probable, but uncertain gain, if Mr. *Spencer* and the Dutchess both lived many years: he considered not only the age of the parties, but their manner of life. If he had bought upon lives without knowing something of them, it would have been a ground for a commission of lunacy; the proposal simply accepted of by defendant, without tacking any one condition of his own.

Fifthly, The fairness and equity of the price, &c. and now the actual event. [329]

Whoever buys on a life, must have a particular regard to the constitution and manner of life, and age of the person. Mr. *Loubier*, who has been examined in the cause, and is a Director of the *London* insurance, says, unless all these circumstances concur, they never will insure at the publick offices. As to the objection of inequality, the bargain itself supposes an inequality, and that the Dutchess of *Marlborough* would die first, otherwise no money ought to have been paid; but it should have been, I lay you a wager of 5000*l.* the Dutchess of *Marlborough* dies first, supposing it equal.

The Dutchess of *Marlborough* took more care of her health than most people; Mr. *Spencer* was intemperate in wine and women. Mr. *Middleton* the surgeon proves he would not forego his pleasures, for any advice with regard to health, *for on his taking the liberty to tell Mr.* Spencer, *that if he went on in his irregular course, or did not alter his way of life, he would destroy himself; he desired Mr.* Middleton *would not trouble himself about it, for that he did not desire to live longer than his constitution would enable him to live in the manner he liked.*

Mr. *Spencer* had frequent venereal disorders, and in their severity; and insurance offices, let it be whose life it will, deduct two years, when a person has gone through such a shock to his constitution. He was careless of his health; for if he heated his blood with sitting up the night before, he, next morning, frequently appeared to his friends in the night-gown he brought into the world with him: he was afflicted with the rheumatism from *August* 1739, and some part of 1741, and salivated in the *November* of that year: two witnesses indeed say, he was hale and sound till within ten months before his death; and yet others say, he was but a twelve-month before his death very ill; his complaint of want of appetite and indigestion carried him to *Bath*; these were notoriously the effects of former drinking and a broken constitution, and not sudden disorders.

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Physicians are not certain, nor infallible, they pronounce people dead, and yet they recover and bite them. Sir *Scipio Hill*, after he was given over, lived 24 years, and annuities were held on his life: every body looked on the Dutchess's life as very good, and Mr. *Spencer's* very bad, at the time of the bargain; for a common rheumatism, the grand relief a very uncommon remedy; it certainly was the ill consequences of former intemperance, so inveterate as to get into his bones, and yet could not come at the root of it. In 1744, he drank drams and small beer in the morning.

Did not the defendant then run equal risque? Take it on the event of deaths, the Dutchess of *Marlborough* lived six years and a half, and Mr. *Spencer* only 20 months more; he dies through want of care, and she of old age.

It is difficult to say, what the risque was equal to; they have
[330] endeavoured to shew for the plaintiffs, Sir *Abraham Janssen* could have insured *Spencer's* life, during the Dutchess of *Marlborough's*, for 5 *l. per cent.* but have examined only *Stephen Loftin* to this particular, and it is very material that they might have examined many more; and material too, that *Loftin* does not say, he inquired into his health and manner of life before he insured: for argument's sake, I will suppose the defendant could have insured at 5 *l. per cent.* He must so insure as to have all his money back; he must insure the principal, interest and premium; interest must be computed on interest, and no other way of doing it, for if I lend at 5 *l. per cent.* and am not paid till the end of six years, I have not 5 *l. per cent.* for my money: bishops' leases are computed on this footing, so in this court between tenant for life and reversioner, not an equal computation, for the advantage is against the reversioner.

Suppose interest and premium insured the first year, interest upon interest and premium, and interest on that the second year, and so to the Dutchess of *Marlborough's* death, it would have amounted, the *October* in which she died, to 9663 *l.* and he must have insured another year.

The bargain, therefore, in all circumstances fair; and in no bargain whatever does this court weigh it on nice rules of equality; as for instance, if a man wants a particular piece of land, contiguous to his own, and gives 30 years purchase, the court will not set it aside for that reason only.

The plaintiffs have not gone into evidence, to shew Mr. *Spencer* could, in any time of his life, have had this money on a better bargain.

Sixthly, The opinion Mr. *Spencer* had of it in his own private thoughts.

He knew whether he was handsomely or unhandsomely dealt by, or whether imposed upon: There were numberless declarations of his in private, that he had been fairly dealt by: None of the witnesses say, they heard the least insinuation, he ever complained of his bargain: he writes himself to Sir *Abraham Janssen*, after the death of the Dutchess of *Marlborough*, to bring a bond and judgment; the defendant, as is proved in the cause, said, that

that though he wanted the money, he would not distress him; on which *Spencer* replied, how much more handsomely you use me than other people do; he afterwards pays the defendant 1000 *l.* in part, and then another 1000 *l.*; all these actions shew his own private opinion of the defendant, and that he did not think himself under any distress or influence.

Lord Chancellor asked, how soon after the Dutchess of *Marlborough*'s death the money was to be paid?

Upon turning to Mr. *Backwell*'s deposition, he gives the following account, that he told Sir *Abraham Janssen*, Mr. *Spencer* would pay him 10,000 *l.* at the Dutchess's death.

And therefore, said the Solicitor-general, though the defendant's answer says, it was proposed to pay him 10,000 *l.* at, or some short time after the death of the Dutchess of *Marlborough*, yet, as there is no evidence to contradict it's being liable to be paid at the time of her death, it makes an end of any question that might arise from the payment being postponed to a further time. [331]

The use that was to be made of this money is very material, it was for payment of debts, and so likewise was the application, for the money was paid into *Lostin*'s hands, for the discharge of his transaction.

To say that the defendant thought, at the time, there might be a doubt on the validity of the contract, is impossible, because that is making him a lunatick; for then it was saying, one way you win, but every way I lose.

The next question, Whether the contract is void in law.

And I agree with Mr. *Crowle*, if void in law, it is putting it upon a clear solid foundation: a bargain for a contingency, and no objection made that it is not lawful, and for any contingency that is lawful, you may even at law contract: if any objection at law, it must be upon the statute of usury, where a greater interest than the rate allowed is taken.

A notion prevailed for many years, that it was not lawful to take any hire for money; this was adopted from the canon law, and even prevails to this day in many catholick countries. It is astonishing how prejudice should have kept common sense so long out of the world! Why is not money a commodity, as well as any thing else? And yet a very sensible civilian *Domat* argues against it.

Harry the Eighth, towards the latter end of his reign, had a mind to get the better of it, not in a direct way, but by fixing the rate of usury, which continued down to Queen *Ann*'s time.

Mr. *Locke*, in his considerations upon reduction of interest, seems to think, for political reasons, the rate of interest should not be fixed at all, but left to find it's own rate of value in the market; and being of this opinion, he never lent or borrowed.

A contract of usury, is the hire of money at a certain price, for the use of it: there must be a principal, and there must be, to bring it within the statute, a rate of interest exceeding what is allowed; if of another nature, not within the statute; at common

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mon law, a condition on hazard, and peradventure is not within it; some old statutes call it *dry exchange*.

Contracts on bottomry are not excepted out of the statute, but depend on the nature of the thing: discounting of notes, no principal due from discounter, which is forebore; so buying up securities at a lower rate, when paid, it comes to more than legal interest, compared with what the buyer gave; so in the case of annuities for life, or lives, where money is not to be returned. The case of *Fountayne* v. *Grimes* (a). So in the particular sort of insurance, interest, or no interest, which is only a wager, and not within the statute.

(a) Cro. Jac. 252.

If in the truth and real substance of the contract, the agreement be for the payment of a principal sum, with forbearance and a higher rate, then certainly it is within the words, and no shift or shape can secure it; all colourable sales, and colourable exchanges are within it; no contract between man and man, but may be turned to a *shift*. No contrivance can exceed the rate of interest; it is absolutely void

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All the cases that have been cited prove this, that where the treaty is upon a contract for usury, and more is taken than the legal interest, no evasion can secure it.

Clayton's case came on upon demurrer, and confesses a corrupt agreement, the contingency there next to nothing; and this was fixed by evidence.

In *Mason* v. *Abdy*, *if the person die within six months*, and there the man was in good health, and the corrupt agreement pleaded, and no objection to the pleading, therefore must be taken as admitted.

The case of *Button* v. *Downham* was also on demurrer, and the corrupt agreement admitted. The rest are all cases of higher interest taken than the act of parliament allows.

Consider the present case, and apply it to the statute.

What is it on the first proposal and communication? A bargain upon a contingency.

Is there a principal due? No.

Is there a rate for forbearance? No.

It has been objected, That the witnesses say, borrow, lend, and loan, and that these expressions shew it is a contract for money.

A loan, says Mr. *Crowle*, not consumed by the using, is called *commodatum*, as if I lend a horse, house, &c. it is gratuitous.

Another sort of loan called *mutuum*, as oil, wine, &c. here something is taken for it.

But was the present ever proposed as a loan upon usury? Or as a proposal for principal and forbearance?

I hope it will not be heard out of *Westminster-hall*, pray advance me a sum of money on this contingency, and then it will be good; but if you had said, pray *lend* me a sum of money on this contingency, then it would be bad.

Suppose an action on this bond, could they declare on a corrupt agreement? Suppose they set out the whole transaction in pleading,

pleading, and conclude it to be done with a corrupt intention, could a jury, upon the evidence, believe this to be a forbearance of the principal. Earl of Chesterfield v. Janssen.

The very rate of interest depends upon the contingency itself, for no man alive could say, what would be the rate of interest.

If no contingent bargain can be made upon a life, but what is within the statute of usury, *that*, I will allow, would put it for the future upon clear grounds and solid foundations.

I will next consider, upon what rules of equity they are intitled to be relieved.

Courts of equity administer justice out of a conscientious principle, therefore every case must stand on its own circumstances: no fraud here, or over-reaching, nor any charge of that kind in the bill, or suggested at the bar, no evidence from whence imposition is presumed: it must be submitted then as between man and man, whether Sir *Abraham Janssen* has been [333] guilty of any misbehaviour.

They were aware of this on the other side, and therefore have gone on another principle; that though good in law and in conscience, yet this court ought to set it aside on principles of politicks, and make this the foundation of the jurisdiction of this court, as applied to these cases.

But this court will never say they exercise a legislative authority. If a contract be good at law, or in conscience, this court will not set it aside. As for instance, *the South sea Company's bulls and bears in* 1721, could not be set aside till the legislature interposed, neither could it prevent or relieve against *laying wagers in political matters*; but an act of parliament in Queen *Anne's* time put a stop to it. So as to gaming; as for instance, *fair hazard on the dice*: it is an easy matter to shew it very detrimental to the publick, and yet can any case be cited where the court has relieved against money fairly lost, before the late act of parliament interfered.

The legislature has made a law, that buying chances before it is known what they are, shall be set aside; this court could not do it.

Misera servitus est ubi lex est vaga. Nothing more miserable than that rules of property should be precarious and uncertain, and yet, according to the arguments of the plaintiff's counsel, though my contract is legal, and equitable too, it may be for speculative reasons bad: this is punishing a man who has done no wrong.

There are a great many instances alluded to, but no fixed rule produced; but it is said the court will set it aside, for reasons concerning the publick.

It is a misfortune attending a court of equity, that the cases are generally taken in loose notes, and sometimes by persons who do not understand business, and very often draw general principles from a case, without attending to particular circumstances, which weighed with the court in the determination of these cases,

If

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If a trustee properly, and *bonâ fide*, agrees with the *cestui que trust*, that will take off the presumption of unfairness.

If a common prostitute, hackneyed in the ways of men, gets a contract from a person for her benefit, there arises a presumption she is making a gain; it is her daily trade (1): but if *a mistress* only, who is true to him, the court will not relieve, for she may be presumed to be imposed upon, as well as imposing upon (2).

So in marriage-brocage bonds, the relation who takes money is bribed; and from such a bias on his mind, he cannot give her the advice he ought as a relation. Suppose I treat with the father of a lady for marriage, and I make a private agreement to give him a part of the fortune, is not this a fraud?

In the case of Sir *Abraham Elton*, he engaged to pay a sum of money on his marriage, but as there arose no presumption of fraud, the court would not relieve, but decreed him to pay it.

The same as to selling of places, where there is no leave to sell, bad, because a breach of trust; but if leave to sell, it will not be set aside.

[334] Another instance of gratuities or securities to attornies pending the business, set aside.

The misfortune, as I said before, is laying down these as general rules, when in the principal case of this kind, *Walmsley* v. *Booth* (3), before *Lord Chancellor*, 2d of *May* 1741, circumstances had great weight, even the character of *Japhet Crooke* had great weight, who was *more likely to impose, than be imposed upon*; but I never understood that the court has said that an attorney shall take no gratuity, above common fees, before a cause is finally ended, as suppose a verdict obtained by his care and conduct.

In *Woodhouse* v. *Shipley*, (4) before *Lord Chancellor*, the 17th of *March* 1742, there is no general rule laid down about bonds on account of marriage, but the court was of opinion there was an imposition in that case on the father, and decreed relief; but desired not to be understood to say, what would be the case, if such bond had been given by two persons *sui juris*, or *emancipated*.

I have reserved for the last what are called *post-obits*.

It is said they have relieved on this ground singly, that no heir shall be allowed to make such contracts.

But I say they relieve on the misbehaviour of the person who seduces a young man, and makes a bargain with a *filius-familias*, by feeding his extravagance.

He then cited *Domat*, under the head of loans, and his comment on the *lex Macedoniana*; to shew that the civil law does not extend it to a person emancipated.

(1) *Bainham* v. *Manning*, 2 *Vern*. 242. *Walker* v. *Perkyns*, 3 *Burr*. 1568.

(2) See *Whaley* v. *Norton*, 1 *Vern*. 483. *Bainham* v. *Manning*, 2 *Vern*. 242. *Spicer* v. *Hayward*, *Prec. Cha*. 114. *Annandale* v. *Harris*, 2 *P. W*. 432. *Cray* v. *Rooke*, *Ca. temp. Talb*. 153. *Hill* v. *Spencer*, *Amb*. 641.

(3) Post. 2 vol. 25. S. C. Barn. Cha. Rep. 475. S. C.

(4) Post. 2 vol. 535. S. C.

As

As to the cases cited, Lord *Nottingham* relieved upon evidence; Lord Keeper *North* thought *he* went too far; Lord *Jeffreys* not far enough. Earl of Chesterfield v. Janssen.

A man's natural temper, though ever so able, will give a tincture to his notions of evidence.

In the case of *Berney* v. *Fairclough*, and others, the 32 *Car.* 2. I, says Lord *Nottingham* (according to his own manuscript from whence I cite it) made him pay the principal money borrowed before I would grant the injunction, and at the hearing I relieved, because such infamous trade should be discouraged, and in the star-chamber was punishable corporally. But his Lordship did not relieve the same plaintiff in another cause against *George Pitt*, tho' his advantage was three to one, because the father was in good health at that time, nor did he put it on the difference between money and wares.

Lord *Jeffreys* laid a different stress on the evidence than Lord *Nottingham* did, and relieved for this reason, and affirmed the decree.

In *Twisleton* v. *Griffith*, circumstances too had weight. Did not the defendant stay till the father was ill? Did not he take him out of the father's hands? This was a misbehaviour, and had great weight.

In *Curwin* v. *Milner*, Lord *King* said he was tied down by precedents, and therefore he would not certainly have carried it an *iota* beyond the precedents. It is probable too there were circumstances in that case, because there was a double contingency.

But it is going a great way to say a man cannot sell a reversion; Mr. *Spencer* is not *filius-familias*——Shall no man sell an estate in jointure to his mother?——Shall no man join in selling a remainder?——Is it possible to support this?——No! it cannot. [335]

The case of *Batty* v. *Loyd*, 1 *Vern.* 141. never contradicted. I have a note too of a case where an heir sold a contingency, and yet not thought unsaleable. In the case of *Whitfield* v.   (1), an heir sold in the life-time of father and mother, there was no dispute, but this was fairly obtained, and the court decreed further assurance by the heir, and gave leave to make use of his name.

An instance with regard to an officer who assigned his future pay, came on to be heard, and discountenanced, because it is eating the earnings of his daily pay, before he has it (2).

Courts of law allow them good as contracts, but not as conveyances; a court of equity goes farther.

Then what is this public good, this rule they so much insist on, that no man shall spend above his annual income? How can that be prevented? Is it in human nature? He will spend it; men of the best sense have done it; where will be the publick utility? where the encouragement to industry? Will the court consider every man as a lunatick who exceeds his income? Another

(1) Q. If not *Whitfield* v. *Fausset*, 1 *Ves.* 387. S. C.

(2) See *ante* 214. note 1.

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ther end perhaps, to lock up property for another age; is that desirable? Will it procure money on easier terms? It is directly the contrary, and as clear as any proposition in *Euclid*; and I refer them to Mr. *Locke* in the treatise before mentioned. If Mr. *Spencer* could not have it on these terms with any security to the defendant, he must have distressed him much more by taking pledges of plate, *&c.*

It is extremely material that the court should not determine it upon this last ground, whatever may be their opinion as to the validity of the contract in law, or the conscionableness of it in equity.

June the 22d, 1752.

Mr. *Noel* in reply:

THE general question is, Whether the facts in the present case afford a reasonable ground for relief in a court of equity? It is admitted to be a matter of great moment; *first*, in respect to preserving families from ruin, under pretence of relieving present want.

I will shew that the court may relieve, without infringing the liberties of mankind, or hurting property.

No man has a right in his own property beyond the limits of conscience; men are bound to use their own, so as not to hurt or prejudice another. I set out with this principle early; it is laid down in the case of *Bosanquet* v. *Dashwood*, *Cas. in Eq. in the time of Lord* Talbot 38. the court may relieve, where the case is not strictly illegal, upon rules drawn from the cases of nature and reason. It is allowed, no written law can possibly take in

[336] a case of this kind, as they cannot possibly foresee every emergency. By politicks Mr. *Solicitor General* must mean only publick utility.

I will consider it first on the statute of usury, and hope to shew it is clearly within it.

Usury within the statute is securing a higher premium of gain than the statute allows.

They object *the statute means, where the principal lent is to be repaid.*

But here it is double the principal to be paid.

They would establish likewise, *that it must be a communication of borrowing and lending of money*, and that there was no communication here, *on the one part*, for borrowing, or for lending *on the other*.

The terms upon which the defendant did it can make no alteration, for if the original proceeding is *for borrowing and lending*, terms cannot make it cease to be a communication for money.

Has not every case laid it down that there must be no communication for money? And though the penalty be severe, yet the statute must be construed liberally; then has care been taken here, that there was no communication for money?

They

They have attempted to lay down another rule, *that where the principal is risqued, it is not usurious.* Earl of Chesterfield *v.* Janssen.

In *Burton*'s case, 5 *Co.* held, to be usury notwithstanding the risque, and nothing said there of the greatness, smallness, or extent of the risque.

A principle indeed laid down in the books, that it is not usury if any uncertain gain, and left to the honour of the person if he will pay more than legal interest; but if the *lender* ties down the *borrower* to pay more, *hoc est vitiosum.*

The statute goes upon another principle, that contingent bargains are bad, reserving more than legal interest, unless for convenience of trade and commerce, and reasons of publick utility.

Serjeant *Hawkin* in his *Pleas of the Crown*, when he speaks of the cases on usury, lays it down, it is usury notwithstanding the risque, and makes no distinction whether great or small.

In the present case Mr. *Spencer* absolutely was bound to pay, and could not be relieved against the double payment at any time.

Principles of property are to be drawn from the general purview of the statute, and such as are most likely *to meet with the mischief.*

Meet with it then! If a sum stipulated to be lent, be it with or without risque, exceeds the legal bounds, let it be construed within the statute.

A life of *thirty* against *seventy-eight* is too strong, and looks too much like a *shift.*

They are forced by this great inequality to have recourse to another thing, *that the young life was broken, and therefore the old a match for it.*

Mr. *Backwell* does not remember a syllable said about the goodness or badness of Mr. *Spencer*'s constitution, at the time of the application to the defendant, nor does he say in his answer, that he refused to lend the money, but that he did it on weighing and considering the proposal. [337]

What is the material result of this? Why that, upon inquiry, he did not find the report of Mr. *Spencer*'s declining health true, and therefore the risque not being so great as at first imagined, it determined him to comply with the proposal.

The effects of his intemperance, as appears by evidence, sufficiently removed; for his last relief, for a particular disorder, was in 1732, six years before this contract, and then the witnesses say he was of a strong robust constitution. *Loftin* and *Thompson* say he was of a sound strong health, and therefore likely to outlive the Dutchess of *Marlborough:* these are their own witnesses who were connected with him, and in the service of his family.

Another reason they urge is, a person must be calculating how much interest they lose in the mean time while the contingency is depending.

Very hard driven! for they compute *interest upon interest, præmium for insurance, interest upon that, and interest too upon that interest*, and so round the compass, and yet, after all this labour, falls

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falls short some hundred pounds of the gains the defendant makes.

I would not desire a stronger proof of the usuriousness of this contract, than the hard shifts they are put to in order to save it out of the statute.

Judging by events I always understood to be the worst rule of judging; the only proper way, What was the chance at the time? And Lord *Mountfort* says, the Dutchess of *Marlborough*'s life was not worth more than three years purchase, and therefore her living six years is of no weight.

It is said no imposition is charged by the bill.

The contract is charged to be usurious, and charged to be exorbitant, and that the defendant took advantage of Mr. *Spencer*'s necessities; therefore what do they mean by saying, We have not charged imposition? if not in terms, yet necessarily implied.

As to Mr. Spencer'*s great property,* he was only tenant for life; *as to his personal estate,* he was not in effect and substance *sui juris,* because his fears of blowing up his hopes in the Dutchess of *Marlborugh* prevented him from making use of the *personal estate.*

It is then said, *he wanted money on a just cause for paying debts,* and that his best friends would have advised this method; nay, *your Lordship* would have done it.

Lord Chancellor: *I will relieve you from this part of the argument; I would not for my own part have advised it in any circumstances.*

Mr. *Spencer* was bound to pay it, even if the Duchess did not leave him a shilling! What would have been his condition then? Is it not clear he staked his ruin on this engagement?

No mention made that he was indebted to tradesmen at the time the money was borrowed; his own private justice might indeed lead him to apply the money in this manner, but it is
[338] no sort of excuse to the defendant, because *he* had not this view in advancing it.

The defendant was engaged to keep it a secret on the principle of Mr. *Spencer*'s dependance on the Dutchess of *Marlborough*, this therefore was putting him under fetters. No body pretends that Mr. *Spencer* did not know the terms, or ignorant that he was only 30, and therefore it was his apprehension of the Dutchess that subdued him to the imposition.

I do not dispute but that a son may dispose of a reversion, but that is not the case here, it is the hard severe terms we object to, and in the judgment of a court of equity, is a fraud where the elief does not infringe on the just rights of mankind.

Wiseman's case, *a risque on the death of an uncle.*

Here on the death of a grandmother, therefore why not stronger?

It is admitted arguments of publick mischief are laudably adopted into this court.

Is not this a growing evil? all mankind feel it!

As to the transactions which are subsequent to the bargain, being a confirmation, the defendant's counsel rely on *Cole* v. *Gibbons*, 3 *Wms.* 390.

But

But the executors here do the duty much better by endeavouring to be relieved. Earl of Chesterfield v. Janssen.

The next case, *Standard* v. *Medcalf*, turns strongly against them, for though the house of lords affirmed the decree, and by that confirmed the will, yet if she recovered her senses, did it without prejudice to any alteration she might make in that disposition, therefore this not properly a confirmation of the settlement.

Mr. *Spencer* acknowledging the debt, that he could not pay it, but would execute a new security, and pay the defendant at times, shews his necessity, and that he had no prospect of doing it but by indulgence.

The new bond produced by the defendant, antedated to the day of the Dutchess of *Marlborough*'s death, but charged by the bill, that it was to be paid in a month after the death of the Dutchess, and though by his answer he swears he cannot be quite exact as to the time of payment agreed, yet, in order to gain more interest, carries it back to the day of her death.

If the court cannot relieve where it is double the sum, for illegality, they cannot relieve if five times the sum; and therefore the argument of publick mischief must have great weight, as no man can say what bounds may be set to extravagant contracts of this kind, unless it meets with a check from this court, in the manner we have prayed by our bill.

The cause was ordered to stand over till *Michaelmas* term, and in the mean time a search directed to be made after the original bond, or, if that cannot be found, a copy of it.

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February the 4th, 1750.

The Earl of *Chesterfield*, and Others, Executors of Mr. *Spencer*, —— —— Plaintiffs.

Sir *Abraham Janssen*, Baronet, —— Defendant.

The cause stood for judgment.

Lord Chancellor in court,
Assisted by { Lord Chief Justice *Lee*, The Master of the Rolls, and Mr. Justice *Burnett*.

MR. Justice *Burnett*: The counsel for the plaintiffs in this cause have insisted principally upon three things.

First, *That the original contract is usurious, and contrary to the statutes of usury.*

Secondly, *That, supposing it be not an usurious contract, it is such an undue advantage taken of a man's necessity upon an expectancy, that this court will relieve against it as an unconscionable bargain.*

Thirdly, *That the new security ought to be considered in the same light as the old, and a continuation of the fraud.*

On the part of the defendant it is insisted, this is a mere contingent bargain, and in the nature of a wager only; no circum-

stance

Earl of Chesterfield *v.* Janssen.

ſtance of a diſtreſſed heir ſeduced from parental government; no fraud or impoſition, and therefore not warranted by former precedents, to ſet this contract aſide.

And that if the court could have relieved on the original agreement, yet cannot, conſiſtent with the rules of equity, do it, when the party has voluntarily taken upon himſelf to confirm it.

As to the firſt queſtion, Whether a loan of 5000 *l.* to be paid 10,000 *l.* on the death of the Dutcheſs of *Marlborough* in the life-time of Mr. *Spencer*, be ſuch an uſurious contract as is within the ſtatutes, or only a mere caſual contingent bargain and not uſurious.

This court has adopted the uſe of the word loan, in caſes of *bottomree*, as well as in common money tranſactions, and therefore ſhall make uſe of that term likewiſe.

To make this contract uſurious, it muſt be either, becauſe it is within the expreſs words, or an evaſion or ſhift, to keep out of the ſtatutes.

It would be miſpending time to give the opinion of Civilians, and Canoniſts, upon the head of uſury, becauſe trade and commerce have made great alterations with regard to money; Lord *Coke*, in his 2d *Inſt.* 89. ſays, *At the time of the ſtatute of* Merton, *and alſo before the conqueſt, it was not lawful for Chriſtians to take any uſury, as appeareth by the laws of St.* Edward, *&c. and* Glanville, *and other ancient authors and records; and no uſury was then permitted but by the* Jews *only.* In Lord Coke's 3d Inſt. 152. he

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ſaith, *that by the ſtatute of* 37 H. 8. *and* 13 Eliz. *all former acts, ſtatutes, and laws, ordained, and made for the avoiding or puniſhment of uſury, are made void, and of none effect; ſo at this day, neither the common law, nor any ſtatute is in force, but only the ſtatute of the* 37 H. 8. 13 Eliz. *and* 21 *Jac.* Hardr. 420. *e contra, for* per *Lord Chief Baron* Hale, *Jewiſh uſury was prohibited at Common law, being* 40 l. per cent. *and more*; but no other.

Nothing is legally uſurious but what is prohibited by the ſtatutes, and to make a contract ſo, muſt be within the expreſs words, or an evaſion or ſhift to keep out of them.

It muſt be agreed then, nothing is legally uſurious, but what is prohibited by the ſtatutes; and the material ones are the ſtatute of the 37 *H.* 8. *c.* 3. *ſect.* 3. *No perſon by way of any corrupt bargain, loan, exchange, chevyſance, ſhift, or intereſt, of any wares, or other things, or by any other deceitful ways, ſhall take in gains for the forbearance of one year for his money, or other thing, that ſhall be due for the ſame wares, or other thing, above* 10 l. *in the hundred.* And the ſtatute of the 12 *Ann. ch.* 16. varies in nothing from the former acts, but the reducing of legal intereſt, for in the penal clauſes all the words of the ſtatute of *H.* 8. are taken in.

So that the caſes determined on the firſt of thoſe ſtatutes, are looked upon as authorities upon all the ſubſequent ſtatutes.

Whatever ſhift is uſed for the forbearance, or giving day of payment, will make an agreement uſurious, and is by a court and jury eſteemed a colour only.

Suppoſe

Suppose a man purchase an annuity at ever such an under price, if the bargain was really for an annuity, it is not usury. If on the foot of borrowing and lending money, it is otherwise; for if the court are of opinion, the annuity is not the real contract, but a method of paying more money for the reward or interest, than the law allows, it is a contrivance that shall not avoid the statute, by giving the avarice of one kind of men an opportunity of preying on the necessities of another. 4 *Leon.* 208. 2 *Lev.* 7. *King* v. *Drury*. *Noy* 101. *Cro. Eliz.* 642, 643.

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If a bargain was really for an annuity, tho' bought at ever so under a price, no usury; if on the foot of borrowing and lending money, otherwise (1).

A bargain on a mere contingency, where the reward is given for the risque, and not for the forbearance, is not usurious; for how can it be said, with any propriety to be for the forbearance, when the day of payment itself may never come.

If money is lent to be paid with more than legal interest; as for instance, in the case of *Clayton*, 5 *Co.* 70. *where it was agreed between the plaintiff and defendant, on the* 14*th of* December, *that the plaintiff should lend the defendant* 30 l. *to be repaid the first of* June *following, and that the plaintiff should have* 3 l. *for the forbearance, if the plaintiff's son should then be living, and if he died, then to repay but* 26 l. *of the principal money*; this may be usurious, for if there is a borrowing of money, and a communication for interest, the device to have gone beyond the rate of 10 l. *per cent.* said the court, is fraudulent, and within the statute, otherwise the statute would be vain. For he might as well have made the condition, that if 20 persons, or any of them, should be living at the day, &c. then he should have 33 *l.* [341]

Where there is a borrowing of money, a device to have more than the legal rate of interest, is within the statutes of usury.

He then mentioned several of the most material cases on this point, and which were chiefly relied on by the plaintiff's counsel, to make this an usurious contract, and concluded with *Mason* v. *Abdy*, 3 *Salk.* 390. and laid a stress upon the last reason of the resolution of the court, *because there is an express provision in the bond to have the principal again*, 5 Rep. 6 . 70. *and* 15. and the same case in *Moor. Carth.* 67. *Comb.* 25. 1 *Shower* 8.

The slightness or reality of the risque seems to be the only guiding rule, that directed the court in the case of *Bedingfield* v. *Ashley*, *Cro. Eliz.* 741. *There* A. *delivered to* B. 100 l. *who, by indenture, covenanted with* A. *to pay to every one of* A's *children, which then were, and should be living at ten years end*, 80 l. A. *having then five daughters*; it is not usury, *said the court, but a mere casual bargain.* But *if he had been to pay* 400 l. *at ten years end, if any were living then, it would be a greater doubt*; *or if it had been to pay* 300 l. *if any were living at one or two years end*, that had been usury, *because of the probability that one would continue alive for so short a time, but in ten years are many alterations.*

The case of *Long* v. *Wharton*, 3 *Keble* 304. though ill reported, seems to be good law: For there, *in error upon a judgment in debt upon obligation to pay* 100 l. *on marriage of the daughter, and if either plaintiff or defendant die before, nothing. The defendant*

(1) So *Richards* v. *Brown*, *Cowp.* 770.

pleads

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pleads the statute of usury, and that this was for the loan of 30 l. *before delivered, to which plaintiff demurred*; *and* per cur. *This is such a kind of casual bargain as bottomree, and the judgment affirmed.*

I should be glad to know, why a bond on a man's life is not as much an adventure, as on the bottom of a ship; a ship may sink the day after the bargain is made; a man may die the next day after his life is insured; but whatever favour courts may shew in contracts beneficial to commerce, they will not establish contracts of another kind to the prejudice of the statute.

There can be no forbearance, for what may never be due, as the ship may never return; so that it is merely a contract upon the risque.

The rule that governs the court in bottomree bonds is the risque of the principal, but may be so contrived, as to be construed an evasion of the statute, as well as any other contract.

But suppose a contract was made for a ship's return to *Newcastle* from *London*, or to *Dover* from *Calais*, at a season of the year when there is little or no danger, would not the court look on this as colourable, and a mere evasion of the statute?

And in the case of *Joy* v. *Kent* in *Hardr. Reports*, it appears very plainly from what the court did there, that even a bottomree bond may be an evasion of the statute, as well as any other contract, or Lord Chief Justice *Hale* would never have sent it to trial.

The first case of bottomree is *Sharpley* v. *Hurrell*, *Cro. Jac.* 208. there the rule that governed the court, was the real risque of the principal, and the hazard the lender run of having less than the interest which the law allows, and possibly neither principal nor interest.

[342] Mr. Justice *Dodderidge* in *Roberts* v. *Tremaine*, *Cro. Jac.* 509. makes very proper distinctions between contracts usurious, and not usurious: Mr. *Attorney General*, in his argument for the defendant, has stated these distinctions, as to what contracts are usurious.—As to contracts not usurious: *If I lend to one* 100 l. *for two years, on condition to pay for the loan thereof* 30 l. *but if he pay the principal at the year's end, that he shall pay nothing for interest*; *this is not usury, for the party hath his election, and may pay it at the first year's end, and so discharge himself.*

In the case of *Soame* v. *Gleon*, *Siderf.* 27. *Debt upon obligation for* 300 l. *in which there was a condition, that if a particular ship went to* Surat *in the* East Indies, *and returned safe to* London; *or if the owner or the goods return safe, that then the defendant pay to the plaintiff* 40 l. *for each* 100 l.; *but if the ship*, &c. *is lost by unavoidable casualty of sea, fire, or enemies, to be proved by sufficient testimony, then the plaintiff to have nothing. The question was, if this contract was usurious within the statute, as defendant has pleaded it.*

Resolved per cur.' *This is not usury within the statute, but a good bottomree contract*; *and the Chief Justice* Bridgeman *took a difference between a bargain and a loan*; *for where there is a plain bargain as here, and the principal hazarded, this cannot be within the statute of usury, for there are apparent dangers of the sea, fire, and enemies between this and the* East Indies, *which endanger the loss of the principal*,

cipal, and such contracts, called bottomree, tend to the increase of trade, and it is by this, several orphans and widows live in the port towns of this realm; but otherwise it is of a loan where the principal is not hazarded; *judgment* per totam curiam, *that this was not usurious.* Earl of Chesterfield v. Janssen.

I cannot therefore but be of opinion, that this is not a contract originally usurious, but a contingent bargain, and founded on the risque only.

The second question is, That supposing it be not an usurious bargain, yet, whether it is not such an undue advantage taken of a man's necessity, upon an expectancy, that this court will relieve against it as unconscionable.

The court need not determine whether a person advancing money to an heir or expectant, should have an extraordinary premium, for an extraordinary risque, because it might be made an ill use of out of the court.

If it was necessary to give an express opinion on this point, I should be under great difficulties; but when the cases come to considered, I may be relieved from this necessity.

It would be too hard to say, that an heir or expectant should not borrow money, let his necessities be ever so great, or, which is the same thing, that the person advancing shall not be suffered to have an extraordinary premium for an extraordinary risque; on the other hand, it might be dangerous to give a sanction to such bargain.

I will state the arguments of plaintiff's counsel, and then shew the court is under no necessity to determine this point, and I am sure no court would willingly give an opinion, that might be made an ill use of out of the court.

First, Say they, it makes two of the worst passions in the human breast meet, avarice on the one side, and craving appetites on the other.

Secondly, A man shall be providing a liberal supply for a son, or a near relation, as he imagines, when he is, at the same time, in fact laying up for, perhaps, twenty money-lenders; and is thereby deluded to give away to strangers what he intended for his own family. [343]

The supplying the necessities of young heirs, for lucre, has been a growing practice, and the court, from time to time, have extended the remedy to meet the mischief.

Nott v. *Hill*, 1 *Vern.* 167. is one of the first cases Lord *Nottingham* relieved on the gross unreasonableness of the bargain, which implied no man could be drawn into it but by imposition. Lord Keeper *North* reversed this decree, because there did not appear any express imposition. Afterwards Lord *Jeffreys* confirmed the decree made by Lord *Nottingham*, *declaring he took* Hill's *purchase to be an unrighteous bargain in the beginning, and that nothing which happened afterwards could help it.*

The court in process of time extended the remedy, where the necessity alone of the person borrowing induced the contract.

The first case of that kind was *Berney* v. *Pitt*, 2 *Vern.* 14. Lord *Nottingham*, when it came before *him*, relieved against nothing but the penalty. In *H. T.* 1686, *Lord* Jeffreys *held it an unconscionable bargain, discharged Lord* Nottingham's *decree, and ordered the defendant to refund to the plaintiff all the money he had received of him, except the* 2000l. *originally lent, and the interest for the same.*

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In Twisleton v. Griffith, 1 Wms. 310. *there were marks enough of an imposition to warrant relief on that foot, but Lord* Cowper *chose rather to establish it on general principles, to prevent a growing practice of devouring an heir; and Lord* Jeffrey's *decree in* Berney v. Pitt, *standing, shewed that every one thought the same was just, and that there was therefore no attempt in parliament to reverse it. His Lordship also took in the whole objection, that at this rate an heir could not, without difficulty, sell a reversion, and said he saw no inconvenience in the objection, for this might force an heir to go home, and submit to his father, or to bite on the bridle, and endure some hardships, and in the mean time he might grow wiser and be reclaimed.*

In *Curwin* v. *Milner*, 19th of *June*, 1731, 3 *Wms.* 392. *marginal note, Lord* King *relieved, but said, if the thing had been new, he would not have gone so far, but thought himself bound by precedents.*

These are the cases principally relied on by the plaintiff's counsel. It is insisted on the other side, that none of these cases bear any similitude with the present, for here are no practices of fraud and imposition; Mr. *Spencer out* of parental authority, and not in bad circumstances, for he had 7000*l.* a year at that time, and said too, the risque here is equal, and not as in *Curwin* v. *Milner, where the contingency was double to pay* 1000l. *for the* 500l. *lent, if defendant survived his father, or father-in-law.* The offer here was sent by the borrower, and accepted on his terms; therefore it is the borrower's own seeking. This too is so equitable a bargain, that if the court would enter into the just proportion

[344] or calculation of such a bargain, and the usual rate for insurance of principal, interest, and premium, it will appear to a demonstration, that if the Dutchess of *Marlborough* had lived half a year longer, the defendant would have been a loser. And also it is not yet laid down that heirs should not borrow on the expectancy, and that a contract must either stand or fall upon its reasonableness or unreasonableness, and that will be a sufficient terror to the lender.

And indeed it might be difficult to give an opinion on this; for it may be thought too rigid to say, that an heir shall not borrow upon an expectancy; as some persons are so niggardly and sparing to their children, *that a poor heir may starve in the desert, with the land of Canaan in his view,* if he could not relieve himself this way.

Mr. *Spencer* besides has taken away the argument of necessity, by considering the whole himself, and in the freest and most voluntary manner imaginable has confirmed the contract, and may be therefore said to have established it with his eyes open, which brings me to the

Third question, *Whether the new security shall be considered in the same light with the old, and a continuation of the fraud* (1)?

Though the court might have relieved upon the original contract, yet will not relieve against the confirmation of it, if fairly obtained.

I know of no case where this court, though they might have relieved in the original contract, have relieved against the confirmation

(1) Post. 354. note.

firmation of it, where there is no pretence of fraud or imposition in obtaining it; but if there was any thing of that complexion in the confirmation, there indeed it is considered only as a continuation of the first fraud. Earl of Chesterfield v. Janssen.

And of this kind is the Earl of *Ardglasse* v. *Muschamp*, 1 *Vern.* 237. and *Wiseman* v. *Beake*, 2 *Vern.* 121. where the court looked on it as a mere contrivance and colourable proceeding, and made use of a very strong expression, *It is a double hatching the cheat.* These were cases heard before the Lords Commissioners.

But can the confirmation *here* be said to be obtained by force, imposition, or contrivance? The defendant was far from being pressing for his money, even after the death of the Dutchess of *Marlborough*; for he stayed from *October* to *December* before the old contract was confirmed.

And though there is no case to warrant relieving against such a confirmation, yet there is a strong case to support it. *Cole* v. *Gibbons* and others, and *Martin* v. *Cole* and others, 3 *Wms.* 390. *where Lord* Talbot *admitted, that had all depended on the first assignment, he would have set it aside, as being an unconscionable advantage made of a necessitous man; but when the person, after being fully apprized of every thing, chose to execute a deed of confirmation of his former assignment, and not the least fraud or surprize had appeared on the part of the defendant, it was, he said, too much for any court to set all this aside.*

At the bottom of this case there is another, that goes upon the same principle, where *Lord* Cowper *said, that after the plaintiff had coolly, and without any pretence of fear or duress, entered into a bond to the defendant, he had thereby ascertained the damages, and ought not to be relieved.*

Upon the whole, therefore, I submit it to *your Lordship*, that there is nothing usurious in this contract, which can warrant setting it aside upon the statutes. [345]

And supposing any thing unconscionable in the thing originally, yet Mr. *Spencer* taking upon him voluntarily to confirm it, I cannot help thinking it would be too much for a court of equity to overturn such a bargain, and therefore my advice is to relieve only against the penalty of the bond.

The Master of the Rolls: *

* Sir *John Strange.*

The first question is, *Whether the defendant's originally advancing* 500l. *in the manner deposed by Mr.* Backwell, *and admitted by himself in his answer, and the bond taken upon it, are to be considered as usurious and void in law?*

The second question is, *If the bond be not within the statutes of usury, whether the bargain is of such a nature as will intitle the parties to relief, on the circumstances of this case, in a court of equity?*

The third question is, *Whether what appears to have been done by Mr.* Spencer, *after the death of the Dutchess of* Marlborough, *will vary the case, or influence the determination of this court?*

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I agree with the reverend and learned judge, that the contract is not within the statutes of usury.

The 12th of Q. *Anne*, *cap.* 16. appears to me to be calculated for such loans, where two principal circumstances must concur.

First, Where there is an agreement for payment at a future day.

And *secondly*, Where the premium for forbearance is greater than the statute allows.

The contingency here, a wager, Whether Mr. *Spencer* or the Dutchess of *Marlborough* died first?

In the present case, if the contingency happened one way, the whole money was lost, and therefore may be properly called a wager between the parties, whether Mr. *Spencer* or the Dutchess of *Marlborough* died first?

It is said, if the design of the parties were, one should borrow, and the other lend 5000*l.* the colour, or shift to evade the statute, will not avail.

But whether an agreement be usurious or not, may be determined two ways.

First, On the verdict of a jury, on a plea of a corrupt agreement.

Secondly, By the court's exercising their own judgment on the particular circumstances of the case.

Where a bond is lost, no action can be maintained, because not pleadable with a *profert hic in curiâ* (1).

But on a *scire facias* against the executors of Mr. *Spencer*, no action could be maintained, for the bond being lost or destroyed, could not be pleaded with a *profert hic in curiâ*; and it was so laid down in the case of *Foot* and others, against *Jones*, *Easter* term 9 *Geo.* 2.

The other method of the court's exercising their own judgment is still open, as in the case of *Roberts* v. *Tremaine*. *Clayton*'s case, 5 *Rep.* shews what sort of shifts they must be that a court will consider as an evasion of the statutes of usury. *Comb.* 125. shews what are, what are not hazards; and, amongst other things, Lord Chief Justice *Holt* said, dying within half a year is no hazard. [346] But if there be a wager between two, it is not usury; for the bargain was *bonâ fide*, and so laid down in several of the old cases.

The present case is fully before the court. In order to make it usurious, it must be determined to be a shift to get an exorbitant premium, and colourable only to evade the statute.

Now it appears to me to be a mere bargain on chance, a wager which out-lived the other, Mr. *Spencer* or the Dutchess of *Marlborough*.

Some stress has been laid by the plaintiff's counsel on the word *lend*.

But I think that concludes nothing as to the nature of the contract itself, but is a playing on words only. Every bargain of this kind is a loan, even bottomree contracts are so, and expressly called loans by act of parliament.

(1) See *anon. post.* 2 vol. 61.

Therefore

Therefore it is not the expression, but the nature and intent of the agreement which must determine, whether this contract be a simple loan or risque.

Earl of Chesterfield *v.* Janssen. The intent of the agreement, and not the expression, determines whether a contract be a loan or risque.

To be sure, one reason why so large a premium has been allowed on bottomree bonds, was out of regard to commerce; but the principal reason must have been, that they are not within the statutes of usury, because the whole money is *in hazard.*

Bottomree bonds not usurious, because the whole money is *in hazard.*

I am clearly of opinion therefore on the first point the bond was not usurious, and consequently not void in law.

The second question is, If the bond be not within the statute of usury, whether the bargain is of such a nature as will intitle the parties to relief, on the circumstances of the case, in a court of equity?

My advice here will be grounded intirely on what was done after the death of the Dutchess of *Marlborough,* and therefore I shall offer nothing on this head, which I would have at all considered as an absolute determination; and yet I see no reason to quarrel with the principal cases that have been cited, because they do not come up to the present, nor would I be understood to abate of the force of them in any respect.

There are many circumstances on the part of the defendant that put his case in a favourable light. There was no intention of fraud in him; the scheme came from Mr. *Spencer,* not from him; the money was advanced on the borrower's own terms, after it had been refused by others, and not thought a good bargain according to the rules of calculation of chances.

But still I think there may be cases where this court will interpose, to prevent improvident persons from ruining themselves before the expectancy falls into possession, though no express fraud or imposition appears.

There may be cases where the court will interpose to prevent improvident persons from ruining themselves, though no express fraud appears.

Every serious and considerate person must see the sad necessity there is for the court's keeping a strict hand over agreements of this sort, but then they must still depend on their particular circumstances; and it is not at all adviseable to give too particular reasons in determinations of such cases.

Agreements of this sort must depend on their particular circumstances.

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The third question is, *Whether what appears to have been done by Mr.* Spencer, *after the death of the Dutchess of* Marlborough, *will vary the case, or influence the determination of this court* (1)?

And I am of opinion, the plaintiffs are intitled to no other relief than in respect of the penalty, on payment of 10,000 *l.* and interest upon it, from the death of the Dutchess of *Marlborough.*

I will now take a view of the different situation of Mr. *Spencer* in 1744, and 1738.

(1) *Post.* 354. note.

In

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In 1738, notwithstanding he had a large income, he was involved in great difficulties, and extremely embarrassed how to pay his creditors: he was obliged to mortgage his expectations from the Dutchess, which was a dangerous experiment, as it might have defeated them intirely: but in 1744, upon the death of the Dutchess, he came into the possession of so great an income, as enabled him to discharge his debts soon; all he desired for doing it, was time, and he had it.

It is not material who took the first step towards the new agreement; two months elapsed before it was absolutely compleated, and *Loftin*, Mr. *Spencer*'s agent, wrote to the defendant by his master's order, the 31st of *October*, to bring the bond and judgment; there was not the least circumstance of undue behaviour in the defendant, or force upon Mr. *Spencer*; and it appears in evidence, that Mr. *Spencer*'s fixed design was to pay off the whole, as soon as he could, with a preference to the defendant, who Mr. *Spencer* himself said, had treated him as a Gentleman.

In consequence of this intention, he paid the defendant 1000*l.* at one time, and a second 1000*l.* at another, and there are frequent declarations of Mr. *Spencer* proved, of his being extremely well satisfied with this transaction from first to last.

But perhaps it may be said, Mr. *Spencer* was not fully apprized of the nature of the bargain, and that he might have been relieved on the first bond.

Even this circumstance is not wanting in the present case, for *Loftin*'s deposition is, that on asking Mr. *Spencer* in 1738, what security he was to give *Sir Abraham Janssen*, he replied, *Janssen* much doubted if a bond would be valid at law, and therefore seemed inclined rather to take a note or memorandum for it only.

This shews Mr. *Spencer* was apprized of the nature of this contract, and the doubtfulness of its validity in point of law.

Mr. *Spencer* continued in the same mind from the beginning to his death, and, to the last, shewed a resolution to confirm the bargain.

Post obits in general, not to be countenanced in a court of equity.

Contracts of a *post obit* nature in general, are by no means to be encouraged, are of a dangerous tendency, a publick mischief, and not to be countenanced in a court of equity: but I ground my advice only on the particular circumstances of this case, and think there may be relief given in other cases, where such strong circumstances do not concur.

I am very far from blaming the plaintiffs for submitting the case to the consideration of the court, but think they did extremely right; and my humble advice upon the whole is, to relieve only on the penalty of the bond.

[348]

The idea of usury in this country fully fixed, by the premium for forbearance of money being settled.

Lord Chief Justice *Lee*: The first point is, As to the nature of usury, considered either according to the Common law, Divine law, Civil law, or Canon law. It would be mispending

time

time to mention any thing on this head, because the idea of usury in this country is fully fixed, and the premium for forbearance of money settled by statute.

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In 2 *And.* 15, and *Mason* v. *Abdy*, *Comb.* 126. and *Carth.* 68. the true distinction is taken between a colourable and a fair and absolute hazard of the principal money; if of the former sort, the bargain is usurious, if of the latter, it is out of the statute.

The material and true reason why bottomree bonds are not usurious is, because they are not within the statutes of usury, and reasons of trade were the only inducements to the court to countenance this kind of contracts.

Bottomry bonds are not usurious, because not within the statutes of usury.

The defendant's contract can be considered only as a real hazard, and it does appear to me very clearly, on looking into all the books, that courts of law have always held, where the profit the lender is to have, is for the hazard, and not for the forbearance, the contract is not usurious.

Where the profit is for the hazard, not the forbearance, the contract is not usurious.

In *Molloy de jure maritimo*, *lib.* 2. *cap.* 11. *sect.* 14. he says, "*Most certain it is, that the greater the danger is, if there be a* "*real adventure, the greater may the profit be of the money ad*"*vanced, and so hath the same been the opinion of the Civilians,* "*and likewise some divines, though others seem to be of opinion, that* "*any profit or advantage ought not to be made of money so lent, no* "*more than those that are advanced on simple loan, and on the peril* "*of the borrower. However all, or most of the trading nations of* "Christendom *do at this day allow of the same, as a matter most* "*reasonable, on account of the contingency or hazard that the lender* "*runs; and therefore such money may be advanced several ways,* "*and a profit may arise, so that there runs a peril on the lender.*"

I shall say no more on this head, but on the second point submit it to *your Lordship*, whether it will not be worth while, for courts of equity to consider, how they may prevent bargains, where a lender runs away with double what he advanced, and to bring them within the measure prescribed by the legislature, the legal premium for money.

Recommended to courts of equity to consider how to prevent bargains, where a lender runs away with double what he advanced.

I speak of the second point in this general manner, because what Mr. *Spencer* has done with regard to the confirmation, has taken away what might have been objected to the bargain's being unconscionable, as it stood originally.

Now if the contract at first should appear to be attended with such circumstances as might induce a court of equity to rescind it intirely, or moderate it only; yet the new agreement would serve to give it a strength which it had not before.

1 *Domat. fol.* 136. *sec.* 4. intitled, *Of the prohibitions to lend money to sons living under the paternal jurisdiction.*

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The lending of money to sons, who are still under the power and tuition of their fathers, being to them an occasion of debauchery, is one of the pernicious effects of usury, and it was by reason of the facility of borrowing money of usurers, that the corruption of the manners of the youth in Rome *was come to such a height, and attended with such consequences, that, to restrain this disorder, a regulation was made by a decree*

By decree of the Roman senate, all obligations of sons, living under the paternal jurisdiction, contracted by the loan of money, are declared null without any distinction, except the creditor advanced it for a cause that was just and reasonable.

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a decree of the senate, called, The Macedonian Decree, *from the name of the usurer who gave occasion to it, by which all obligations of sons living under the parental jurisdiction, contracted by the loan of money, were declared null without any distinction. But if any creditor had lent money for a cause that was just and reasonable, sufficient to support the equity of the obligation; it was by a favourable interpretation of the decree of the senate, that this case was to be excepted from the general prohibition, according to the quality of the use to which the son put the money which he had borrowed.*

The defendant had this exception in his favour, for the contract was made in order to empower Mr. *Spencer* to pay just debts to his tradesmen, and applied accordingly.

It appears by the authority of *Cole* v. *Marlin*, in 3 *Wms.* a subsequent deliberate act, where the party is fully informed of every thing, makes the bargain good.

In the case of *Cann* v. *Cann*, 1 *Wms.* 727. Lord *Macclesfield* makes use of these expressions, *Indeed if the party releasing is ignorant of his right, or if his right is concealed from him by the person to whom the release is made, these will be good reasons for the setting aside of the release; but solemn conveyances, releases, and agreements, made by the parties, are not slightly to be blown off and set aside.*

But here the right was not concealed from Mr. *Spencer*, for the subsequent agreement appears to be made deliberately, there was no kind of fraud in any one circumstance attending it; and therefore I concur in offering my advice in the same way with the Master of the Rolls, and Mr. Justice *Burnet* (1).

Lord Chief Justice *Willes* being ill, signified his concurrence in the same opinion by letter to *Lord Chancellor.*

Lord Chancellor: Before I proceed, it is proper to mention that Lord Chief Justice *Willes*, being ill, has furnished me with his reasons by letter, and authorized me to say, he concurs in opinion with me in the three points that are made in the cause.

In the next place, the able assistance I have had in this cause makes my task much easier, and, unless the novelty of the case called upon me to give my reasons, I might very well be excused from saying any thing on a subject, that has been so fully and learnedly discussed already; and if I could have foreseen on what points this matter would have turned, should have spared the learned judges their trouble.

The first point, *Whether the first bond is void in law, by virtue of the statutes of usury?*

[350] The second point, *If it is valid in law, Whether it is contrary to conscience, and relievable upon any head or principle of equity?*

The third point is, Whether the new security given by Mr. *Spencer* after the death of the Dutchess of *Marlborough*, amounts to a confirmation, and is sufficient to bar the plaintiffs of relief.

The first is a mere question of law, on the construction of the statutes, and therefore to be considered exactly in the same light, as in a court of Common law, and as if an action had been brought on the bond.

(1) *Post.* 354. note.

My

My Lords the Judges are very clear in their opinion, the bond was not usurious, and if I had been doubtful myself in this point, I should have thought notwithstanding, I was as much bound by their judgment now, as if I had sent it to be tried at law. *Earl of Chesterfield v. Janssen.*

But I have no doubt at all of this contract's being out of the statutes of usury, and do not intend to go through the authorities on this head, as they have been fully observed upon already: It is a plain fair wager, and not within the statutes, because no loan. *This contract a wager and not within the statutes of usury (1).*

But if a loan, it has been argued for the plaintiff, that an agreement to receive more than principal and legal interest, on any event, is usurious, and contrary to the statutes.

1 *Domat.* 115. *title.* 5. The civil law has very nice distinctions on *commodatum* and *mutuum*. As to *commodatum*, it is understood in the same sense the law of *England* understands it; but by *mutuum* the civilians mean a loan, where the thing lent is to be restored in *genere*; when any thing was to be paid for hire, it came under the head of *locatio & conductum*. The Common law has not adopted these nice distinctions. On actions for money lent, it is expressed by *mutuo data & accommodata*.

Even money on a risque is called a loan, as in the case of a *bottomree* bond, the 11 *H.* 7. *ch.* 8. The statute contains a general prohibition of all usury, but says, without *condition and adventure*; from hence it appears they understood an advantage might be inserted in a loan of money, and therefore the inserting of a contingency, will not prevent it's being a loan.

If there has been a loan of money, and an insertion of a contingency, which gives a higher rate of interest than the statutes allow, and the contingency goes to the interest only, though real and not colourable, and notwithstanding it be a hazard, yet it has been held to be usurious: Where the contingency has related to both principal and interest, and a higher rate of interest taken than allowed by statute; the courts have then inquired, whether it was colourable or not, and within the distinction taken in the case of *Roberts* v. *Tremaine*, by Mr. Justice *Dodderidge*. *If there be a loan of money, and a contingency inserted, which gives more than the legal interest, though real and not colourable, and a hazard, yet it is usurious (2).*

First, (said he) if I lend 100*l.* to have 120*l.* at the year's end upon a casualty, if the casualty goes to the interest only, and not to the principal, it is usury, for the party is sure to have the principal again, come what will come: but if the principal and interest both are in hazard, it is not usury. *If a casualty goes to the interest only, it is usury; if principal and interest both in hazard, otherwise.*

Secondly, If I secure both interest and principal, if it be at the will of the party who is to pay it, it is no usury; as if I lend to one 100*l.* for two years, to pay for the loan thereof 30*l.* and if he pay the principal at the year's end, he shall pay nothing for interest, this is not usury; for the party hath his election, and may pay it at the first year's end, and so discharge himself. [351]

(1) *Lamego* v. *Gould*, 2 *Burr.* 715. (2) See *Morse* v. *Wilson*, 4 *Durn.* & *East*, 353.

Although

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Reason for admitting bottomree bargains, is, their being out of the statutes of usury.

Although this contract has been called a loan, yet it is merely a case of chance, and I agree with my Lords the Judges, the found and fundamental reason for admitting bottomree bargains, is, their being out of the statutes of usury; for considerations of commerce cannot support them, if held to be within the statutes.

The counsel for the plaintiffs, by way of objection, laid great stress on *dictums* of Judges, that particular care must be taken there is no communication for the loan of money; therefore, say they, this being originally an agreement for borrowing on one part, and lending on the other, is usurious.

Loans upon a real and fair contingency, no more usurious than bottomree bonds.

A very good answer has been already given to this, that the real and substantial foundation of the agreement must be considered, and not mere expressions only; but I will add to it, that loans upon a real and fair contingency cannot be said to be usurious, any more than in the case of bottomree bonds.

And the very stating of the fact, on the purchasing of an annuity, or on the sale of goods, will prove the observation.

A man may purchase an annuity, on as low terms as he can; but if he sets out at first with borrowing a sum of money, and then turns it into the shape of an annuity afterwards, this is a shift, and an evasion to avoid the statutes (1).

It is lawful likewise for a man to sell his goods as dear as he can, in a fair way of sale; but if *A.* applies to *B.* to lend money, and offers to allow more than the legal interest, and *B.* says, no! I will not agree to your proposal on these terms, but I will give you such a quantity of goods, and you shall pay me so much at a future time for them, beyond the price I now fix, and then charges an extravagant profit; this is a shift to get more than the legal interest, and is usurious.

On the second head. I shall follow the prudent example of Mr. Justice *Burnet*, by not giving any direct opinion, but at the same time, the arguments in this cause have made it necessary to say something.

Contracts of this kind *vitia temporis.*

No wise and good man will assert such bargains deserve encouragement, for as they are productive of prodigality on the one hand, so do they beget extortion on the other; want and avarice always generating one another, and these contracts may be truly said to be *vitia temporis.*

This court can certainly relieve against all kinds and species of fraud.

Fraud may either be *dolus malus*, a clear and express fraud, or fraud may arise from circumstances, and the necessity of the person at the time.

There are also hard unconscionable bargains, which have been construed fraudulent (2), and there are instances where even the common law hath relieved for this reason expressly.

(1) *Ante* 340. *Richards* v. *Brown*, *Cowp.* 770.

(2) *Barnardiston* v. *Lingood*, *post.* 2 vol. 133. *Gwyne* v. *Heaton*, 1 *Bro. Cha. Rep.* 10. *Sed vide Willis* v. *Jernegan*, *post.* 2 vol. 251.

James

James v. *Morgan*, 1 *Lev*, 111. was a case of this kind. *Assumpsit* to pay for a horse, a barley corn, a nail, and double every nail, and avers that there were 32 nails in the shoes of the horse, which, doubling each nail, comes to 500 quarters of barley; and upon *non assumpsit* pleaded, the cause being tried before Mr. Justice *Hide* at *Hereford*; he directed the jury to give the value of the horse in damages, being 8*l.* and so they did; and it was afterwards moved in arrest of judgment upon a slip in the declaration, which was over-ruled, and judgment given for the plaintiff.

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But this court will relieve against presumptive fraud, so that equity goes further than the rule of law, for there fraud must be proved, and not presumed only.

Fraud must be proved at law, but equity relieves against presumptive fraud.

To take an advantage of another man's necessity, is equally bad, as taking advantage of his weakness, and in such situation, as incapable of making the right use of his reason, as in the other.

In the marriage brocage bonds, one of the parties to the marriage only is deceived and defrauded, and not either of the parties to the marriage-brocage bond, and yet the court have relieved, for they hold it infected by the fraud, and relieve for the sake of the publick, as a general mischief.

In like manner, where a debtor enters into an agreement with a particular creditor, for a composition of 10*s.* in the pound, provided the rest of the creditors agree, and this creditor at the same time makes a private clandestine agreement for his whole debt, and though no particular fraud to the debtor, yet as it is a fraud on the creditors in general, who entered into the agreement, on a supposition the composition would be equal to them all, the court has relieved (1).

So in bargains to procure offices, neither of the parties is defrauded or unapprized of the terms, but it serves to introduce unworthy objects into publick offices; and therefore, for the sake of the publick, the bargain is rescinded.

Political arguments, in the fullest sense of the word, as they concern the government of a nation, must, and have always been of great weight in the consideration of this court, and tho' there may be no *dolus malus*, in contracts as to other persons, yet if the rest of mankind are concerned as well as the parties, it may properly be said, that it regards the publick utility.

Political arguments, as they concern the government of a nation, of weight in the consideration of this court.

In the cases before this court, there have been sometimes proof of actual fraud, such as *Berney* v. *Pitt*, the Earl of *Ardglass* v. *Muschamp*, and several others.

In these cases too, fraud has been constantly presumed, or inferred from circumstances, and conditions of parties; weakness and necessity on one side, and extortion and avarice on the other, and merely from the intrinsic unconscionableness of the bargain.

The next kind of deceit is, upon other persons who were not parties, as ancestor and father, and the heir and expectant,

(1) *Surrett* v. *Spiller*, *ante* 105. 2 *Ves.* 156. See *Middleton* v. *Onslow*, 1 *P. W.* 768

wher[e]

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where by contrivance an heir or a son have been kept from disclosing his affairs to a father, or other relation, and by that means prevented from being set right, and undeceived; and the ancestor or father, have likewise been seduced to leave their fortunes, to be divided among a set of dangerous persons, and common adventurers.

That there was unconscionableness in the very nature of the bargain, the *hawking* it about shews, that there was also a deceit and delusion on the Dutchess of *Marlborough*, who stood in *loco parentis*, appears from the evidence of Mr. *Backwell*, who swears it was intended to be carefully concealed from her, and that she should never hear of it.

And yet I do admit more circumstances appear here in favour of the defendant, than have concurred in the rest of the cases: Mr. *Spencer* was 30 years of age, there is no foundation to say he was a weak man, nor any charge in the bill of that kind, the bargain was unsought for by the defendant, and intirely proceeding from the borrower, who was of a broken constitution; the money too was borrowed for an honest purpose, to pay debts, and yet, I would by no means have it understood, that this intention alone will in all cases sanctify such a bargain.

In those cases where it has been inserted in the defeazance, that the lender should lose his money, if the borrower dies before father or grandfather; I always thought there was good sense in the words of the court upon those clauses, *that this does not difference the case in reason at all, for in these cases, if the tenant in tail died, living the father, the debt would be lost of course, and therefore expressing it particularly in the defeazance, made the bargain the worse, as being done to colour a bargain, that appeared to the lender himself unconscionable.*

Law-makers, in *Rome* thought it necessary, to put a prodigal under the care of a curator.

Mr. Attorney General said, that it was a vain and wild imagination, to think any general law can prevent prodigality and extravagance, and yet the law-makers in ancient *Rome*, though they were not so weak as not to know, that laws to restrain prodigals might be useless in many instances, thought it necessary still to put a prodigal under the care of a curator, and also made their famous *senatus-consultum Macedonianum* merely with a view to prevent it.

Whatever may be called a legislative authority in this court, I utterly disclaim; but so far as the court have already gone in cases, so far as Lord *Nottingham*, Lord *Cowper*, Lord *King*, and Lord *Talbot*, have gone in the several cases before them, I think myself under an indispensable obligation of following.

I have spent so much time *principally* with this view, that the work of this day may not be misunderstood, as if the court had departed from their former precedents, and established a new one for unconscionable bargains.

Brokers of *post obit* bargains, and junctim annuities, ought to be discouraged in court.

Post obit bargains, and *junctim* annuities, have got their brokers and factors about this town, and I would willingly shut the door against such persons, and am not ashamed to own, I shall always be ready, consistent with the rules of equity, to correct such enormities.

The

The third point is, *Whether the new security given by Mr.* Spencer, *after the death of the Dutchess of* Marlborough, *amounts to a confirmation, and is sufficient to bar the plaintiff of relief.* Earl of Chesterfield v. Janssen.

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If the first bond had been void at law, no new agreement would have made it better, the original corruption would have infected it throughout.

New agreements may confirm, what was at first a doubtful bargain.

But as bargains that are not cognizable at law, are properly the subject of this court's consideration, new agreements and new terms may confirm what might otherwise have admitted a question as to the fairness of it (1).

The evidence seems to prove clearly, that there was no compulsion on Mr. *Spencer* at this time, his necessities were intirely over, for 21,000 *l.* a year was by the disposition in the Dutchess's will added to 7000*l.* a year he had before, so that a little more than a third of his annual income would have discharged the defendant's whole demand.

In the next place, the Dutchess being removed out of the way, the danger of her coming to the knowledge of it was gone, so that he was delivered from that circumstance likewise; and further, there was no ancestor or relation living, on whom any deceit or delusion could be practised.

Loftin's evidence of Mr. *Spencer*'s declarations as to Mr. *Janssen*'s doubting, whether the first contract was legal or valid, is a strong circumstance to shew Mr. *Spencer* was fully apprized of the nature of it, and no fraud or imposition therefore can be suggested on this head.

The confirmation here is much stronger than in the case of *Cole* and *Martin*, because the original bargain here is attended with much fairer circumstances.

Mr. *Spencer* here is a debtor, and Sir *Abraham Janssen* might have distressed him by bringing an action, and yet so far was he from taking this advantage, that he waited two months without stirring one step in the affair.

The plaintiff's counsel have said, there has been only one case of confirmation, where this court have decreed in favour of it, but several, where the court have set aside bargains notwithstanding confirmations, and instanced in the Earl of *Ardglass* v. *Muschamp*, and *Wiseman* v. *Beake*.

But the circumstances in the first of these cases are not at all applicable to the present, the same fraud attended the confirmation, as the original bargain; and in the second of the cases, the confirmation was still more extraordinary, and the person just in

(1) *Stapleton* v. *Stapleton*, *ante* 10. In *Crowe* v. *Ballard*, 3 Bro. Cha. Rep. 120. *Lord Thurlow* thus expresses himself upon the subject of confirmations.—"If a gentleman of rank, fortune and "honour, under age, in distress or other-"wise, gives a bond; and *afterwards* con-"ceives, that he has made a hard bar-"gain, *and knowing that the bond is bad*, "will give a new bond, that will main-"tain the possession of the right of the "holder of the bond, and this act shall be "said to be a confirmation; but not any "act done under the *influence* of the *for-"mer transaction, and the opinion that that "bond is good.*" Vide *etiam Delonaine* v. *Brown*, 3 Bro. Cha. Rep. 633.

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the same distressed situation as at first, and in both of them the original transactions were grossly fraudulent.

But here the original transaction was doubtful at least, if not intirely clear of imposition.

Upon the whole, I am of opinion the only relief the court can give, is against the penalty and judgment, and as the plaintiffs had *probabilis causa litigandi*, and the defendant's a case far from intitling him to the favour of the court, I shall not therefore give him costs against the plaintiffs; for I agree intirely with the Master of the Rolls, that the plaintiffs, as trustees, are to be greatly commended for submitting a question of this nature to the consideration of a court of equity.

[355] *Let it be referred therefore to a Master to take an account of principal and interest due on the bond in* 1744, *and the judgment thereon, and to tax the defendant his costs at law, and on payment to the defendant by the plaintiffs, of what shall be due at law, let the defendant deliver up the bond to be cancelled, and let satisfaction be acknowledged on the judgment, at the expence of the plaintiffs.*

C A P. XXV.

Charity.

(A) *The Power of this Court with Respect thereto.*

January the 27th, 1737.

The Attorney General v. *Jeanes.*

Case 168.

The court will give a proper direction as to a charity, without any regard to an impropriety in the prayer of an information.

IT was said by *Lord Chancellor* in this case, that in an information by the Attorney General for the regulation of a charity, it is the business of the court to give a proper direction as to the charity, without any regard at all to the propriety or impropriety of the prayer of the information (1), and that this case herein differed from all others, wherein the decree must be founded on the prayer in the plaintiff's bill (2).

(1) *Attorney General* v. *Parker*, 1 *Vef.* 43. *Attorney General* v. *Scott*, 1 *Vef.* 418. *Attorney General* v. *Governors of Harrow School*, 2 *Vef.* 552.

(2) The relief should in general be agreeable to the *case* made by the bill. *Grimes* v. *Finch*, post. 2 vol. 141.

January the 27th, 1738.

Attorney General v. *Pile.*

Vide title *Devise, under the Division, Of things Personal, and by what Description, and to whom good.*

Michaelmas Term, 1738.

The Attorney General v. *Gleg.*

MR. *Wright* having by will left several sums of money to be distributed in charities therein described, at the discretion of his executors, named three persons executors, one of whom died before the filing of the information; and the question was, Whether this was only a bare authority in the executors, or coupled with an interest. Case 169.

S.C. Amb. 584. *W.* leaves money to be distributed in charity at the discretion of his executors, three named, one of whom died before the information filed.

Lord Chancellor: I am of opinion that the executors, as taking the whole personal estate, out of which the charities were to issue, had an authority coupled with an interest, as executors have been always held to have in the case of legacies; and therefore the power of nominating the several persons who were to partake of the charity, is continued to the survivor of them.

This is not a bare authority, but coupled with an interest, and survived to the other two executors (1).

But though this is such an authority coupled with an interest as would survive, yet it is so far a trust, that in case of misbehaviour the court may interpose, for it must be allowed, that the court has a particular free and extensive jurisdiction in the case of a charity, and not confined to the proper or formal methods of proceeding requisite in other cases.

This court has a particular extensive jurisdiction in the case of a charity.

I am of opinion that the executors could not divide the charities into three parts, and each executor nominate a third absolutely, because the determination of the property of every object was left by the testator to the direction of all the executors, and so much of the information as seeks a specifick performance of a pretended agreement to that purpose, was dismissed with costs, to be paid by the relators.

The information here was dismissed with costs against the relators.

N. B. This was said to be the first instance of such a direction.

(1) With respect to *naked powers*, and powers coupled with an *interest*. See *Har. Co. Litt.* 113. a. note 2.

After Hilary Term, 1736.

The Attorney General v. *Hayes.*

LORD *Chancellor*: Where a legacy is given to a charity, interest shall be paid from the death of the testator (1). Case 170.

(1) This position is not warranted by the decree in this case. The case was thus.—*Judith Cale* by her will bequeaths 100*l.* to the ministers and churchwardens of the parish of *Chelsea*, in trust to invest the same with the approbation of her executors in the purchase of lands and tenements, and in some good security, and to distribute the yearly interest thereof unto and among six poor widows of the said parish of *Chelsea*, as the said ministers and churchwardens should approve of. She appointed her son *John Cale* and her daughter *Phebe* the wife of the defendant *Hayes*

Hayes executors, and died. Before payment of the legacy of 100 *l.* *John Cale* also died, and by his will appointed his brother *R. Cale* and *Hayes* and his wife executors. The relators applied for payment of the 100 *l.* with interest from the testator's death: which the executors refused to comply with. Lord *Hardwicke* decreed that the charity should be established; and directed the Master to compute what was due for the said legacy of 100 *l.* with interest for the same after the rate of 4 *l.* *per cent. from the end of one year after the death of the said Judith Cale.* Such interest to be added to the principal and laid out in government or other securities with the *consent of the said Phebe*, in the names of the said ministers and churchwardens, in trust for the charity. *Reg. Lib. A.* 1736. *fol.* 346. The same decree was made as to the time, when the interest commenced, in the *Attorney General* v. *Pearce*, as it appears in the Register's Book. *Reg. Lib. A.* 1740. *fol.* 216.

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C A P. XXVI.

Chose in Action.

October the 27th, 1746.

Brown, Assignee of *Roger Williams* a Bankrupt, v. *Heathcote* and *Martin*.

Vide title *Bankrupt*, *under the Division*, *The Construction of the Statute of* 21 Jac. 1. cap. 19. *with respect to Bankrupt's Possession of Goods after Assignment.*

C A P. XXVII.

Church Lease.

Hilary Term, 1737.

Norton versus *Frecker*.

Vide title *Occupant*.

C A P. XXVIII.

Commission of Delegates.

June the 9th, 1737.

Sir *Henry Blount*'s Case.

Vide title *Canon Law*.

CAP. XXIX.

Conditions and Limitations.

(A) *In what Cases the Breach of a Condition will be relieved against.*

(B) *In what Cases a Gift or Devise upon Condition not to marry without Consent, shall be good and binding, or void, being only* in terrorem.

(C) *Who are to take Advantage of a Condition, or will be prejudiced by it.*

(A) *In what Cases the Breach of a Condition will be relieved against.*

Easter Term, 10 Geo. 2. May 11.

The Attorney General v. Doctor *Stephens.*

THE defendant had been regularly elected under Doctor *Ratcliffe*'s donation, and had received the salary for five years, and then instead of travelling beyond sea, pursuant to the directions of the will, upon a suggestion of ill health, resigns, and the trustees accept the resignation. Case 171. S. C. 2 Eq. Ca. Abr. 196. pl. 17.

Above five years have incurred since the resignation of the defendant, and the acceptance thereof by the trustees.

A. having been elected under Dr. *Ratcliffe*'s donation, received the salary for five years, and then instead of travelling beyond sea for five more, as the will requires, upon ill health resigns, and the trustees accept the resignation, and put another in his room. This is a dispensation of the condition. If they had said, when *A.* offered to surrender, we will not accept of your resignation, but you must comply with the terms, or refund, it would have been otherwise.

Lord Chancellor: The *Attorney General* is certainly a necessary party, and the information is properly brought in his name.

Nothing, to be sure, should be done in this court, to invalidate the design of this donation; and on the other hand, I must proceed in such manner as I am warranted to do, by the rules of law or equity.

There are three considerations in this case.

1st, What was the intention of Doctor *Ratcliffe* by his will?

2dly, Whether Doctor *Stephens* has complied with it?

3dly, If not, Whether it gives the relators a right to come into this court, to make the defendant refund what he has received?

Doctor *Ratcliffe* by his will gives several manors, upon trust, *inter alia*, to pay 600 *l.* yearly, to two persons, of *University* Col-

ATTORNEY GENERAL v. STEPHENS.

lege, who shall be elected out of the physick line, by the Archbishop of *Canterbury*, *&c.* for their maintenance for the space of ten years, in the study of physick, and to travel half the time for their better improvement, and in case they should die, or the place be vacant, then the vacancy to be filled up by two others, and the whole overplus to *University* College.

I think if the defendant had forfeited, the college would certainly be intitled to it, let it come to them by any means whatever: but as to the construction of Doctor *Ratcliffe*'s will, it was manifestly the design, that they should travel, and that they should travel five years, but it is truly said, there is no particular time appointed when they should begin their travels.

The words are, "the half of which time they should spend in "travelling for their better improvement," and therefore it is most natural to intend that he meant the last five years for their travelling, because he imagined they would, in the first part of the time, be laying in a proper stock of knowledge.

But then it can never be understood that he intended in all events they should travel, for there might be accidents which would utterly incapacitate them for travelling, and therefore he did not expect they should refund when such accidents happened, but left it at large to be judged of by the circumstances; besides, this is given not only for the expence of travelling, but for other views likewise, for maintenance, *&c.*

The next question, Whether Doctor *Stephens* has complied with the intention of the donor?

Now it cannot be said, that Doctor *Stephens* has complied with Doctor *Ratcliffe*'s intention; but then it must be considered, whether he has a reasonable excuse for not doing it, and upon this there is no doubt, but that natural disabilities will excuse, such as becoming *non compos*, sickness, or other natural disabilities: but then it has been insisted upon, that the defendant has fraudulently accepted of this employment, in order to put the money in his pocket, without any intention ever to do the duties of it: if this had been proved, I should have no doubt but that I might decree the defendant to refund; but that is not the case, for there is not one single circumstance given in evidence to shew he took it upon such a fraudulent design; instead of *that*, there is very strong proof to the contrary, even by persons of good credit in the profession, that he had diligently applied himself to the study of physick, and besides, that he was in an ill state of health, in a wasting and decayed condition, which threatened a consumption; and even supposing, that he was actually able to travel, but in his own mind did not think himself capable, yet he would not be guilty of a fraud for *an imaginary* as well as a real distemper would equally incapacitate him.

I do not think the clause in the will can possibly amount to a condition, but is merely directory, that half of the time they shall travel, and is not like an executory consideration: As where *A.* pays money upon such *a consideration* and it is not performed, an action at law lies for *A.* for money had and received to his use,

cafe, which is expreffed thus by the *Scotch* law, *caufa data fed non fecuta*. ATTORNEY GENERAL v. STEPHENS.

The agreement is to pay 300*l. per ann.* for ten years, if during that time he travel five years; will the not travelling oblige him to refund? No! unlefs the electors had fuffered him to continue in this poft the whole ten years, then poffibly the relators would have had a right to call him to an account, and might have obliged him to refund for five of the years.

Doctor *Stephens* communicated his illnefs firft to the Archbifhop of *Canterbury*, and lodged a formal refignation with him. I think the truftees are the electors, and the perfons whom Doctor *Ratcliffe* intended fhould have the whole management of this donation; they have accepted of this refignation, without infifting upon Doctor *Stephens*'s going on, and it is certainly a difpenfation of the condition: if they had faid we will not accept of this refignation, but you muft comply with the terms, *or refund*, then the cafe would have appeared quite different; but, inftead of that, they have accepted of the refignation, and actually put another in his room.

Therefore I think as Doctor *Stephens* has taken the burden of this upon him, and as at the end of five years the truftees accepted a furrender from him, and did not infift then on his refunding, it would be unreafonable to require it now.

But even if it was a condition, yet fuppofe this cafe, a patron prefents to a benefice, and takes a bond, as he may, from prefentee to refide for ten years, and he, after five years are expired, fhould refign the living for the refidue of the term, and the patron accepts it, and prefents another, no one will fay that he has forfeited the annual income of this living, during that part of the ten years he was refident upon it, for the acceptance of the patron has difpenfed with the breach of the condition, and no action could be maintained on the bond.

Therefore I fhould think it too hard in the prefent cafe, to decree an account againft the defendant.

There are two other points.

1ft, Confideration, Whether the travelling fellows muft be members of the college?

2dly, Whether they have a power to let the chambers which they hold in the right of their fellowfhip.

Whether a fellow of a college has a power to let his chambers, is a point determinable by the vifitor only.

As to thefe matters, they are not properly the objects of this court's jurifdiction, but ought rather to be determined by the vifitor, and the will befides is extremely incorrect in this refpect.

As to the being members of *Univerfity* College, it is natural to fuppofe no body would refide in the college, unlefs they were actual members; but this is out of the cafe, for Doctor *Stephens* has complied with that part of it.

And as to the power of letting their chambers, I do not think that Doctor *Ratcliffe* had laid his fellows under greater reftrictions than thofe of the other colleges are liable to; and if I was to inquire whether a fellow of a college has a right to let his chambers, I fhould make wild work, and give an opportunity to half the univerfity to bring bills againft particular perfons to dif- [361]

 cover,

Attorney General *v.* Stephens.

cover, whether they have not forfeited their fellowships by thus letting out their chambers.

Decreed the information to be dismissed, but without costs, as Doctor *Stephens* has had a very large benefaction already from Doctor *Ratcliffe's* donation, and *University* College.

(B) *In what Cases a Gift or Devise, upon Condition not to marry without Consent, shall be good and binding, or void, being only* in terrorem.

April 30th, and *May* 2d, 1737.

Henry Harvey, and *Catherine* his Wife, and *Ann Clutton*, Widow, Two of the Daughters of Sir *Thomas Aston*, Bart. deceased, } Plaintiffs.

Lady *Aston*, Widow of the said Sir *Thomas Aston*, Sir *Thomas Aston*, Bart. Son and Heir of Sir *Thomas* deceased, Sir *John Cheshyre*, *Henry Wright*, and *Andrew Kendrick*, Esqrs. } Defendants.

Case 172.

(*a*) Sir *Joseph Jekyll.*

Ca. temp. Talb. 212. S. C. Com. Rep. 726. S. C. 5 Vin. 89. pl. 10. S. C. 15 Vin. 272. pl. 18. S. C. See the note at the end of this Case.

The trust of a term under a settlement was, that if there should be two or more daughters of the marriage; then the trustees were to raise and pay to each the sum of 2000*l.* *if she marry with the consent of her mother, if living, and a widow; if not, then with the consent of the trustees or the survivor of them, his executors, administrators, or assigns.*

THIS cause came on upon a petition to discharge an order made by the Master of the Rolls (*a*) for raising the fortune of the plaintiffs: The case was this.

Sir *Thomas Aston* by lease and release limits his estate, to the use of himself for life, then as to part to Lady *Aston* for life, for her jointure, then to his first and other sons in tail male, and for want of such issue, to trustees for the term of 1000 years, with power of revocation, this term is by a codicil made to take effect immediately after his death, and before the estate of the son, and declared the trust of the term to be, that if it should happen that he should have no son, but two daughters living at the time of his death, then the trustees, out of the rents and profits of the said estate, should raise and pay to the youngest of such daughters 5000*l.* *if she marry with the consent of her mother, if living, and continuing his widow; if not, then with the consent of the trustees, or the survivor of them, his executors, administrators or assigns*, and should pay to such daughter the yearly sum of 100*l.* for her maintenance till her marriage with such consent.

And in case it should happen, that he should have a son and two or more daughters, then that the trustees should raise and pay to each of such daughters the sum of 2000*l.* *if she marry with such consent as aforesaid*; and till such marriage should pay each of such daughters the yearly sum of 50*l.* till such daughter should attain her age of 18, and afterwards the sum of 70*l.* for her maintenance as long as Lady *Aston* shall live, and from and after her death shall pay to each the yearly sum of 100*l.* till their marriage:

marriage: and in case any of the said daughters should happen to die before the said portion was paid, that it should not go to her executor, but the estate should be exonerated thereof, or, if raised, should go to him on whom the reversion of the premisses is limited to descend; proviso that the term should cease in case of no son or daughter: or in case of the death of all the younger sons and of all the daughters without marriage. *N. B. Here, the words, with consent, were not added.*

HARVEY *v.* ASTON. And in case any of the daughters die before the portion was paid, that it should not go to the executor, but the estate should be exonerated thereof, or, if raised, should go to him on whom the reversion of the premisses is limited to descend.

Afterwards by will Sir *Thomas Aston*, taking notice of the settlement, directs, that out of his personal estate, there should be paid to each of his daughters the further sum of 2000 *l.* as and for an augmentation of their portions, subject to the same conditions, provisoes and limitations, as their original portions, and in case any of the daughters should die before the original portions became payable, then his will is, that this legacy of 2000 *l.* should not be paid to her executor, but that his Lady and executrix should have the *residuum* of this money, if any, and makes her residuary legatee and guardian of his children.

The father afterwards by his will gives the further sum of 2000 *l.* to each of his daughters, *as an augmentation of their portions, subject to the same conditions, &c. as the original portions.* And if any of the daughters die before the original portions become payable, then he wills that this 2000 *l.* should not be paid to her executor, but that his Lady and executrix should have the *residuum* of this money, and makes her residuary legatee.

Sir *Thomas* died leaving eight daughters, and soon after his death a bill was exhibited in this court to have the will proved, and the trusts performed, and it was decreed, that the trustees should raise the maintenance immediately, with liberty to the parties to apply for further directions.

In 1734, the plaintiff *Harvey* married one of the daughters without consent, and *Clutton* married another without consent, and a bill of revivor was filed, to which Lady *Aston* answers, that she had before such marriage given notice to the plaintiffs, that they would not be intitled to their portions, in case they married without her consent, and that she could not in conscience consent to her daughter's marriage with the plaintiff *Harvey*, because he could not make her any suitable settlement; but that notwithstanding this *caution* they both married without her consent.

The plaintiff *Harvey* married one of the daughters without consent, and *Clutton* another also without consent. They are not intitled to the portions under the settlement or will.

And, upon a hearing at the Rolls, it was decreed, that the plaintiffs were well intitled both to their original and additional fortunes, and an order pronounced by his Honor accordingly (1); the present application was made by way of petition to discharge that order.

Lord Chancellor, thinking it a case of great doubt and difficulty, declared that he would be assisted by Lord Chief Justice *Lee*, Lord Chief Justice *Willes*, and Mr. Justice *Comyns*, and appointed the 21st of *Nov.* 1737, for the hearing thereof, when it came on accordingly.

(1) See the case as reported in Cases *temp. Talb.* 212.

Mr.

Harvey v. Aston. Sir Dudl. Rider.

Mr. *Attorney General* for the plaintiffs argued, that this restraint in the present case ought not to be considered as a necessary qualification, but that it ought at all events to be raised and paid whenever the daughters married.

That, while alive, parents have a natural controul over their children; but though the law allows them such a power to restrain the children in marriage, yet it is not to be delegated to any other person, and it is absurd to say, that this power shall descend to any assignees whatsoever, or executors or administrators.

Parents may be fond of extending their power, even after their children come of age; but the law leaves marriages as free as possible, and therefore does not encourage parents in this extent of their power. *Swinb. part the 4th. 12th chapter, God. Orph. Leg.* 380.

The only difference between the Civil law and ours is, that where there is no devise over, we call it a devise *in terrorem*, but the civil law says, such a condition is absolutely void. *Jervois* v. *Duke*, 1 *Vern.* 20. *Bellasis* v. *Ermine*, 1 *Cha. Ca.* 22.

It has been insisted that this is a condition precedent, and the legacy could not vest, because the condition has not been performed; but allowed, if it had been a subsequent condition, it might have been otherwise.

He argued, that in these cases, the court had made no difference between conditions precedent and subsequent. *Gresly* v. *Luther*, *More* 857. In the present case, the thing that is to be done is marriage, and in all cases of conditions precedent there must be performance, or the estate can never vest; here the most material part has been performed, which is marriage, and consequently the estate vested. *Semphill* v. *Baily*, *Prec. in Chan.* 562.

" If any of my daughters should die before the original por-" tion becomes payable, then he wills that this legacy of 2000 *l.* " should not be paid to her executor, but that Lady *Aston* his " executrix should have the *residuum* of the money."

This cannot be called a devise over, which is only saying, that it should fall into the *residuum* of the personal estate, and would have done *so* if this had not been provided for.

So much as to the additional portions. Next as to the original portion; the words which are to make a limitation over here, are different from the words in the will, " In case any of the said " daughters should happen to die before the said portion was " paid, that it should not go to her executor, but the estate should " be exonerated thereof, or, if raised, should go to him on whom " the reversion of the premisses is limited to descend."

It has been objected, that this was a case where the money is to be raised out of the land, and the civil law had nothing to do with it.

This would be a good objection, if it was a question to be determined at common law, in an ejectment, or merely a question at common law, but it is manifestly a creature of equity, for

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it is concerning the execution of a trust, which is not a proper subject for the common law to enter into. Harvey v. Aston.

The principles and rules in this case which govern a court of equity, must be consistent with similar cases; though this money is to be raised out of land, yet it ought to be considered as money, and to be governed by the same rules as money.

If money is to be turned into land, it shall be devised no other way, nor considered any other way but as land (1) here the money is to be paid out of this land, into the hands of executors, and the very fund out of which the money is to be raised, becomes a personalty; for though it is a term of inheritance, yet it is personal estate, therefore neither in law nor equity is it to be considered as land, and equity will reverse the very order of things to come at the intention.

The heir at law is favoured upon many occasions, but never to the prejudice of younger children, where the heir is otherwise sufficiently provided for; and tho' the father here has annexed terms to the plaintiffs taking of their portions, yet they are terms which are contrary to the policy of the land, and contrary to the law, and absolutely void.

The great fund out of which portions are to arise is land, and therefore restrictions of this kind, which make this fund precarious, ought to be discountenanced, especially as they likewise discourage marriage, which is a much more probable way of introducing a virtuous education, than if they were born out of wedlock.

I will not say the mother will abuse this power, but if she marries, it devolves on the trustees, and though they are men of honour, and will not, I believe, injure the daughters; yet if they die, it goes to executors or administrators, and even assigns, who may possibly be knaves and fools, and consequently very improper to be intrusted with such power.

The court has already determined that this is contrary to the common policy, and have fixed bounds by precedents, from which they will not depart. *Fleming* v. *Walgrave*, 1 *Chan. Cas.* 58. *Aston* v. *Aston*, 2 *Vern.* 452.

Cases of forfeiture never receive any countenance in this court, for in all conditions that are a restraint upon marriage, if not performed, there must be an express limitation over to some other person, or it is no forfeiture; now in this part of the case, it would equally have sunk in the land for the benefit of the heir, if it had not been so expressed in words.

Dr. *Strahan* of the same side.

I shall state the rules of the civil law, and consider it first generally as a provision for daughters.

The civil law has apportioned a father's estate, which it is not in his power to take away; if he should give it away, he must assign some satisfactory reason; he could not clog it, or put any restraint upon marriage.

(1) See *Guidot* v. *Guidot*, *post.* 3 vol. 254.

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The writ, *de rationabili parte bonorum*, shews the civil law has been received and countenanced in *England*.

With regard to marriage portions, the civil law has a particular law for that purpose, *Cod. lib.* 5. *title* 11. *de dotis promissione & nudâ pollicitatione, lex* 7. *Dig. lib.* 23. 2 *Tit. de ritu nuptiarum, lex* 19. *de patribus cogendis in matrimonium collocare. Qui liberos, quos habent in potestate, injuria prohibuerint ducere uxores, vel nubere, (vel qui dotem dare non volunt, ex constitutione divorum Severi & Antonini) per proconsules, præsides provinciarum coguntur in matrimonium collocare & dotare.*

If parents had been allowed to annex conditions to portions, it might, perhaps, have been an unreasonable one, and have frustrated the design of portions. This was contrary to the policy of the republick of *Rome*, the *jus trium liberorum*.

Marriages ought to be free, *libera debent esse matrimonia*, and it is a general rule in the civil law, where a condition is annexed to a legacy by way of total prohibition of marriage, that it is absolutely void.

Jacobus Gothofredus de fontibus juris civilis, p. 291. mentions the *Julian* law *de patripropria* in the time of *Augustus*, that if any person adds a restraint to marriage, let them be free from the condition; they endeavoured then to find out conditions which would not in direct words restrain marriage, but in the implication would have the same effect, by making the consent of a third person the condition of marrying. This was declared to be eluding the design of the *Julian* law, *Dig. lib.* 35. 1 *Tit. de conditionibus & demonstrationibus et causis & modis eorum quæ in testamento scribuntur, lex* 72. *Si arbitratu Titii Seia nupserit, meus hæres ei fundum dato; vivo Titio, etiam sine arbitrio Titii eam nubentem legatum accipere, respondendum est, eamque legis sententiam videri, ne quod omnino nuptiis impedimentum inferatur, &c.* This is *Papinian*'s determination, who was looked upon to be the brightest of all the *Roman* lawyers; and *Cujacius*, in his comment upon this very law, says, His authority is of great weight, and has such regard paid to it in our court, that conditions restraining marriage are held by us, upon his authority, to be absolutely void. *Mantica, lib.* 11. *n.* 8. *Grassius, lib.* 1. *n.* 9. *Covarruvius, n.* 3. takes a difference between marriages with the consent, and the advice of another. *Sanchez de sanct. matrimon. sacramento disputat.* 34. *n.* 19. *Non tantum conditio non ineundi matrimonium, rejicitur a legato, sed etiam conditio ineundi arbitratu, vel consensu tertii, et ratio est, quia qui tenetur consensum vel licentiam alieni petere, tenetur sequi, atque ita matrimonii libertas impedietur.*

Swinbourn, part the 4th, *sec.* 12. lays it down as a general rule, that all conditions against marriage are unlawful, contrary to the procreation of children, repugnant to the law of nature, and detrimental to the commonwealth.

In the present case *Lady Aston* will have the benefit, who is the person to refuse. *Dig. lib.* 30. *tit.* 1. *de legatis & fidei commissis, lex* 43. *parag.* 2. *Legatum in aliena voluntate poni potest, in hæredis non potest.* The heir in this case is to have the benefit also by refusal, and

and therefore *nunquam præsumeretur velle obligari*, and ought not to receive any countenance. HARVEY v. ASTON.

The emperor *Justinian*, *Cod. lib.* 6. *tit.* 43. *Communia de legatis & fidei commissis & de in rem missione tollenda*, saith, *Rectius esse igitur censemus in rem quidem missionem penitus aboleri; omnibus vero tam legatariis quam fidei commissariis unam naturam imponere, et non solum personalem actionem præstare, sed et in rem, quatenus eis liceat easdem res sive per quodcunque genus legati, sive per fideicommissum fuerint derelictæ, vindicare in rem actione instituenda.*

Where a condition is null and void, the question will be then, Whether any devise over or limitation will be good?

When the validity of the condition which is annexed to the legacy is taken off, it becomes absolute, and no devise over can affect it. *Dig. lib.* 35. *tit.* 1. *de condit. & demonstrat. lex* 22. *Quotiens sub conditione mulieri legatur, si non nupserit, et ejusdem fideicommissum sit, ut Titio restituat, si nubat: commode statuitur, et si nupserit, legatum eam petere posse et non esse cogendam fideicommissum præstare*, the condition being void in law, the legacy is discharged of it.

Supposing such consent should be necessary, yet it must be a reasonable objection to the marriage, that is intended by this condition. Here the plaintiff Mr. *Harvey* has 300*l.* *per ann.* in possession, and as much in reversion, and was ready and able to make a proper settlement, and therefore there could be no reasonable grounds for *Lady Aston*'s refusal.

Mr. *Brown* of the same side.

As marriage was the only thing that was really and substantially in the consideration of the parties, that has been performed, and the rest is *in terrorem*.

The whole direction to raise the portion is upon the consent of the mother, and not a word of the father; there are several instances which might be put where this settlement could not take place. Suppose Lady *Aston* should have been visited by the hand of God, and had become a lunatick, how could her consent have been had? Or suppose there had been an assignment of the term, and an administrator of the trustees at the same time, whose consent was necessary to be had?

As it stands on the foot of the settlement, it is a mere penalty, and only *in terrorem*.

Here the children might possibly wait the greatest part of their lives for the consent of persons, to whom they are intire strangers; in 1 *Mod.* 310, Lord Chief Justice *Hale* takes notice of a case cited by the defendant's counsel in *Fry* v. *Porter*, where the consent was to be had in writing, and tho' no such consent, yet decreed a good marriage; and his Lordship said there was great equity it should be so, because (said he) the written consent was only a provident circumstance and wisdom of

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of the devisor, for the more firm obliging the party to ask consent, which the devisor considered might be pretended to be had by slight words; and in the Earl of *Salisbury* v. *Bennet* 2 *Vern.* 223. there was a marriage contrary to the express terms of the condition on which the daughter was to take, and yet the whole portion decreed. In *Jackson* v. *Ferrand*, 2 *Vern.* 424. a portion was decreed to be raised out of land, though the devisee died before the time appointed for the payment.

The common law has paid a great regard to the rule of the ecclesiastical court, with respect to cases of restriction on marriage, *Moor* 857. *Gresley* v. *Luther*, 11 *Jac.* 1. I mention this to shew that these sort of cases have been very anciently taken notice of, for Mr. Justice *Winch*, in giving his opinion, cites a case before this, where there was a condition annexed to a daughter's legacy, that she marry with the assent of the mother, and she sued in the ecclesiastical court for the legacy; it was pleaded in bar that she did not marry with the mother's assent, and, notwithstanding this, she had sentence for the legacy.

The cases of portions are what this court have excercised a peculiar jurisdiction over, contrary to the other side of *Westminster-hall*; and though it is a rule *æquitas sequitur legem*, that must be confined to cases which arise from a legal point, and incidentally come before the court; a mortgage in equity is not considered as a revocation of a will, tho' it is at law; nor will this court consider a mortgage as land, nor allow it to be irrevocable.

I put it upon the gentlemen of the other side, to shew where this court have suffered penalties to take effect, which are in restraint of marriage.

It is not said, any where in the deed, to whom the portions shall go over, provided the daughters marry without such consent; and in *Hayward* v. *Paget*, *Nov.* 12, 1733, it was held a general devise of the *residuum* is the same as no devise over at all.

The money given by the will is as an augumentation of the daughters' portions; and where a legacy is given to a person upon marriage, and the legatee marries accordingly, it vests, though without the consent of a particular person, *Semphill* v. *Bayly*, *Prec. in Chanc.* 562. and where a person who takes it over, takes it as a residuary legatee, it is plainly distinguishable from the cases where it is devised over to a specifick legatee; and therefore this case must fall within the reason of those determinations where the devise is *in terrorem* only.

Dr. *Andrews* for the defendants.

Deeds are undoubtedly of a stricter nature than a will; and as the will in the present case plainly refers to a deed, it must be construed with the same strictness as a deed.

It

It is a legacy uncertain, but to be made certain by a fact; for it is not daughters by name, *but to a daughter only who marries with the consent of the mother*, and no body can take but those who bring themselves within the description. I do maintain that this is a legacy which has never vested, because the condition on which it is given by the testator has not been performed, and, according to the law of the twelve tables, *voluntas testatoris in testamento totum facit*, and though a prohibition of marriage hath not been allowed, yet the civil law permits a restraint upon it. *Cod. lib.* 5. *tit.* 4. *lex* 1. *Cum de nuptiis puella queritur, nec inter tutorem et matrem & propinquos de eligendo futuro marito convenit: arbitrium præsidis provinciæ necessarium est. Swinb. part* 4. *sec.* 12. *par.* 14. "When that which is given with condi- "tion of not marrying, is to be distributed in pious uses, in "case the condition be not observed; here the condition is not "rejected as unlawful, and if he marries, he loses his legacy; "the reason is, for that the law doth more favour piety than the "liberty to marry."

A variance between the old law, and the law in *Justinian*'s time, *vide Instit. lib.* 2. *tit.* 20. *de legatis, sect.* 36. In the old law, a legacy restraining marriage, void; but in the latter law, such legacies, notwithstanding the condition annexed, shall be equally subject to the condition, as any other legacy would be that is left subject to a condition.

The rule in our court is, that the civil law, so far as is consistent with the *jus gentium*, shall prevail. *Grotius* lays it down, that after the death of the father, the mother is intitled to the same obedience from the children as the father, founded upon the fifth commandment.

The *jus trium liberorum* is not in force with us; if a *Roman* had three children, and not able to maintain them, the commonwealth maintained them; but the publick here takes no notice, the parishes must support them. In the *Roman* law they provided not for natural children; but in our law, if a man marries, though he has lawful children, yet he may dispose of his estate to the *illegitimate* issue, in prejudice of the legitimate. By the *Roman* law, the portion was the woman's distinct property; here it belongs to the husband, and here it should be considered as if the father had said, I give 2000*l.* to such a man as shall marry my daughter with the consent of the mother.

Mr. *Fazakerly* of counsel also for the defendants.

This court will consider the consent to be a material ingredient, and without which it could not be a marriage, consistent with the intention either of the deed or devise.

It is said this must be construed *in terrorem*, but I hope the court will not construe men's intentions into such a phantom terror; for if this is the known construction of this court, would any man be so void of understanding, and so trifling, as to make use of a restriction which he is sensible will be void? A restriction which can hardly meet with any

[illegible] v. [illegible]ATON. person so weak and ignorant as to be terrified at it. As to the case of *Jackson* v. *Farrand*, in 2 *Vern.* it is doubtful if that case would be determined as it now stands, if it was to be re-heard.

If this court will construe the intention contrary to the express words, it is impossible they can operate at all; the law will not make an exposition against the express words and intention of the parties, which stand with the rule of law, *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est.*

The laws of nature are so strong upon fathers, that the national law has not obliged them to make any provision, but left it intirely to their discretion, and has given up the children in this respect to the absolute power of the father: Who so proper to make a prudent provision for children as the father, who knows the disposition and temper of each child? Different restrictions may be necessary in one case, which may be unnecessary in another.

The 12th of *Car.* 2. *cap.* 24. *sect.* 8 has given a father an absolute power to dispose of the guardianship of his children, until the age of 21, which shews the sense of the legislature as to parental authority; by the custom of the city of *London*, whoever marries an orphan without the proper consent, though living intirely out of their jurisdiction, yet he is not intitled to the portion; would this custom be permitted, if it absolutely contradicted the known rules of law, as is pretended by the other side? This court, only upon a bill filed, and affidavits produced, that a disadvantageous marriage is apprehended, will prevent the person from marrying without the leave of the court.

It has been said, wherever there is a condition that is *malum in se*, it will make it void, and several instances have been put, as to murder a person, or where it is repugnant to a grant; but this being a collateral thing, and not preventing a marriage, can never be construed or brought within this rule.

They have not cited one authority out of the common law, and with respect to legacies, *your Lordship* has a concurrent jurisdiction with the ecclesiastical court, and if this court follow their rules in similar cases, it is for this reason, that there may be a conformity in the resolutions, and that the subject may have the same measure of justice in which court soever he sued. *Abr. of Ca. in Eq.* 295.

Where a legacy charged upon land is once vested, it becomes money, and goes to the person to whom it is given; but before it is vested, it is a common law charge, and is not for the consideration of the civil law, or the ecclesiastical court. A trust term must be considered as a parcel of the inheritance, till the purpose for which it is raised is satisfied, and the legacy actually vests.

1 *Ch. Ca.* 58. *Fleming* v. *Walgrave*, is not at all to the present purpose; the case is very short, and very obscurely stated; the dispute *there* was besides upon a mere personal trust. The case in *Finch's Reports fol.* 62, too much honoured by being called

called Lord *Nottingham's Reports*, *there*, if the daughter never married, ſhe might be allowed to improve the eſtate, as there was no probability of her marriage at that time; and as ſhe had the abſolute property, if ſhe did not marry at all, upon giving ſecurity that ſhe would comply with the terms, ſhe was allowed to improve.

There is no law to prevent widows from marrying, but they may marry *ad infinitum:* and yet conditions in a will to reſtrain them from marrying, have been held to be binding, though young enough to do great ſervice to the publick in point of children. [370]

The civil law was never received ſo far as to controul property here, but the conſtruction with regard to charges upon land, have always been adapted to the rules and diſtinctions of our own laws: In perſonal legacies indeed it may be otherwiſe, and poſſibly may be influenced by the rule of the civil law; but money which is to be raiſed out of a truſt upon land, cannot be ſaid to exiſt, till the condition, for which the truſt was raiſed is complied with, and can never be called *debitum in præſenti ſolvendum in futuro:* this rule is applicable indeed to a bond, becauſe there the debt immediately commences from the execution, but the defeazance is not to take place till a future day; we inſiſt that this never veſted, becauſe it is only payable upon marriage *with conſent*; and therefore all that has been ſaid with relation to a forfeiture, is an argument without any concluſion.

Secondly, As to the will, if there had been no word but *augmentation*, it could not be taken without a compliance with the terms in the original portion in the firſt place; a caſe determined before the Maſter of the Rolls (*a*) has been inſiſted on; but as there are two caſes of equal authority, being both decided by the ſame perſon, which are adjudged different ways, the queſtion is ſtill as much open, as if this had been a caſe *primæ impreſſionis*.

(*a*) Sir *Joſeph Jekyll*.

Is not the teſtator's intention to give it over equally clear by directing it ſhould ſink in the perſonal eſtate, where he has appointed a reſiduary legatee, who will conſequently have the benefit, as if he had actually in words and by name given it to *the reſiduary legatee*.

Here is a proviſion of 70*l*. *per ann*. to the daughters during the life of the mother, and after her death 100*l*. which they will ſtill be intitled to, though they have married contrary to the reſtriction; and therefore the argument of their being deſtitute falls to the ground.

There never has been any caſe in the eccleſiaſtical court, where it has been determined, that a legacy given upon a contingency, ſhall be a good legacy, before *that contingency happens*, as Doctor *Andrews* informs me.

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Mr. *Attorney General*'s reply.

It is insisted, that the intention of the parties is clear and plain.

Secondly, If so, that this intention ought not to be over-ruled in law or equity.

There are no negative words, that this shall not be raised if the daughter marries without consent, and if the term is to continue notwithstanding the marriage without consent, who is it to continue for? For the daughter only! as it was created for no other end and purpose.

[371] The known construction, that the devises in restriction of marriage, are *in terrorem*, unless there is a devise over, has, in a good measure, been allowed by the defendant's counsel; this has been the general and unshaken rule of the court, and therefore, if not entirely founded on reason, ought to be acquiesced under; but I do maintain, it was established on great reason, for the court supposes the father did not intend to leave the daughter destitute of a portion, but guarded it only by intimidating a child from marrying improvidently, though a child should be told afterwards, this is designed as a terror only and does not debar you of your portion, yet this is not contrary to the intention of the father, for he imagines when they are apprized of this, that they are then of years of discretion, and incapable of making this restriction ineffectual.

It is said, the construing these restrictions void, arises from the principles of the civil law, which is not in force in *England*, and to be sure, considered merely as the *Roman* civil law, has nothing to do here; but the question is, whether the same words in any case before one court of justice, ought not to have the same construction in every court.

It has been insisted, this is a constraint not at all contrary to the rules in law and equity.

The parental authority, when confined to it's just bounds, I will readily allow; but no body will say, the father in *England* has the power of life and death, or that he can imprison, or deprive his eldest son of his estate by right of heirship and inheritance: it will not be denied, but that there is a time, when a child may be as fit to govern himself, as the parent can be to advise him.

It is said, that the law has given the parent, who is the natural guardian, the power of appointing another guardian; and arguments have been drawn too from the custom of *London*, which I allow has been supported upon wise reasons, but they are not applicable here, because at 21 the custom ceases, and here they cannot marry at 30, 40, *&c.* or at any age without the consent of the mother; in the other instance, the law does not extend their view beyond the age of 21; but the parent here has carried his power so far, as to controul his children even after they come to years of discretion: What is this? but *restraining* a person who is of an age equally capable of judging as his own, and is like an attempt to settle an estate *in perpetuum*, after

after destroying the end, by the very means themselves, and generally goes much sooner out of the family, than otherwise it might have done.

It is objected, that the court in devises *in terrorem* have proceeded only in pursuance of the ecclesiastical court, that the two courts, who have a concurrent jurisdiction, may not clash, but it will not hold, if this court should construe it a condition that is binding, though there is no devise over.

The learned doctors allow, though there is a limitation over, yet it is void in the civil law, except in one case, a limitation to pious uses, because there the interest of charity is preferable to the interest of children; this shews that the reason of this court is founded differently from the civil law, for here it goes upon the general policy of the kingdom. [372]

Mr. *Fazakerly* said, there was no instance of any case of this nature in the ecclesiastical court. I am very glad no instance can be produced there, for then the consequence is, this court has nothing to borrow from the proceedings in the ecclesiastical court.

Tho' the money is directed to be raised out of the land, yet it is to be considered only as money, but it has been insisted by Mr. *Fazakerly*, it must first vest, before it can be considered as money; but notwithstanding it is not, as they say, vested, yet it does not follow, that it should not till then participate of money, and vesting or not vesting makes no difference; nor can it be raised in any other court, for it is trust-money, and properly the creature of this court, and it has been held here more than once, that the construction of trusts ought to be favoured in the same manner as the construction of wills.

The case of *King* v. *Withers*, in Lord *Talbot*'s time, was, upon an appeal to the House of Lords, affirmed (*a*); there what is called on the other side a general rule, seems to be broke through, for it is determined, that money to be raised out of land, shall not sink for the benefit of the heir, where marriage, the end of the portion was answered, though the whole of the condition for raising it, was not complied with.

(*a*) Cases in Chan. in Lord *Talbot*'s time, 117. Prec. Chan. 348. S. C.

The cases cited of a devise over, are not applicable here, because in the present instance there is no legal proper devise over.

Needham and Sir *H. Vernon*, resolved in Lord *Nottingham*'s time, is in point for us, and tho' the book itself is of no authority, yet the manuscript under his hand, not differing from the printed case in any essential point, will surely have it's weight. *Aston* v. *Aston*, 2 *Vern.* 452. of the same kind, and security given for performing the condition, because there was a devise over.

Lord *Harcourt*'s saying in *King* v. *Withers* (*b*) that a portion to be raised out of land, is to be considered as land, can have no weight, for there is a great difference to be made between the mere saying of a judge, and a *dictum* upon which the judge gave his judgment; but in that very case, the determination was contrary

(*b*) Eq. Ca. Abr. 112.

HARVEY v. ASTON. trary to the *dictum*; for the portion was decreed to be raised, and consequently a *dictum* not necessary to the judgment, and of no authority.

It has been insisted on the other side, there is a devise over.

Can it be said, this is a giving over, where it would have fallen of course into the inheritance, if this had not been said? A man devises an estate to his heir, he does nothing by it, for it would descend to him without it.

The rule of considering conditions in restriction of marriage, as *in terrorem*, is a rule of this court only, and founded upon the policy of the land, and not in conformity to the reasoning of any other court.

[373] As to the portions under the will, it is said, if they are not intitled to the original portions, they are not intitled to the *augmentation*.

It does not follow, because the testator calls it an *augmentation*, that they shall not have this portion, in the same manner as portions have been decreed in other wills: suppose the very words of the settlement had been inserted in the will, yet it shall have a different construction where it is applied to the landed estate, and where to the personal; and therefore, what ever may be your Lordship's opinion as to the settlement, you will not determine on the will by the same way of reasoning.

It has been insisted by Doctor *Andrews*, that these words are intended as descriptive, and that no persons can take, but who bring themselves under this description.

Is not saying *daughter* in the precedent words, as descriptive as if he said, my daughters *Mary*, *Ann*, &c.

It is said, that this is given over, and to the remainder man of the estate, but the words are, *In case any of my said daughters should happen to die before the said portion was paid, that the estate should be exonerated thereof:* this is not giving it over, but makes it a nullity, for it ceases, if the contingency of marrying fails, and nothimg is to be raised.

Can it be supposed that a child will always continue an infant, that they will never arrive at years of discretion, never capable of judging for themselves? Shall they be thought fit to preside in the great assembly of the nation, be placed at the head of armies, nay even preside in this court, and yet incapable of judging, where marriage is concerned?

Doctor *Strahan*'s reply.

How far the civil law should have weight, is in the breast of the person presiding here, but it is certain the civil law is interwoven in the original institution of this court; what I insist upon is, that being tied up to marry with the consent of another, was by that law considered as a total prohibition, and held to be null and void.

It has been objected, notwithstanding the general rule, that some restrictions were allowed upon marriage, with regard to point of time, or restriction to particular persons; but this is no argument

argument that a total prohibition is allowed, for they are still admitted to marry, observing the direction of time, or direction of persons: the principal alteration that I know of, was restraining a woman from a second marriage, and this was relaxing the general law, for the interest and preservation of the children of the first marriage, in the *Julia Marcella*, but the emperor *Justinian* repealed and abolished the *Julia Marcella*, and made such condition, whether in restraint of widows, or in restraint of others, absolutely void. HARVEY v. ASTON.

Dig. lib. 33. *tit.* 4. *De dote prælegata, lex* 14. is very far from coming up to the present case; there the testator had two daughters and a son, the eldest of which married in his lifetime, and taking notice of his youngest daughter in his codicil, he says, *Filiam meam Crispinam, quam vellem tradi nuptui cuicunque amici mei & cognati approbabunt, providebit tradi Pollianus sciens mentem meam, in æqualibus portionibus, in quibus & sororem ejus tradidi*; this amounts at most to a wish that she would marry with the approbation of his friends and relations, but not that if she married without it, she would forfeit her portion. [374]

It has been said, that the father had a very great power, and that he might delegate it to others.

I allow it to be very great, though it was very much abridged; but whatever power he might have in his life, I apprehend, even in the civil law, he could not delegate if after his death: with respect to paternal authority in the point of guardianship, he could not appoint a tutor to his child, beyond the age of 14, and after that age, the *Roman* law thought the child of sufficient maturity in judgment, to chuse for himself. In the present case they must be continually under guardianship, under their mother, while she lives, and under others after her death: I admit, according to the passage cited out of *Grotius*, the children ought to be under the obedience of their parents, and in point of marriage too, so far as to take the direction of their parents, but not under such a servile obedience, as to refrain from marrying at all, if the parent should advise it.

There are no printed reports of cases with us, but there have, and must have been cases of this kind; but what is the consequence if there had been no case at all of this nature determined, then it must be adjudged according to the standard rule before this case.

After the counsel had finished, the court declared they would take time to consider before they delivered their opinion; and the cause by order of *Lord Chancellor*, stood in the paper for judgment the 5th of *June*, 1738.

Mr. Justice *Comyns* (1) who on that day delivered his opinion first, after stating the case *ut supra*, said, he thought it very clear, that it was the intention of Sir *Thomas Aston*, that his daughters should not have their original portions, if they married without such consent as prescribed, and this intent appears upon every clause of the deed.

(1) See the argument of Mr. Justice *Comyns* more fully reported *Com. Rep.* 726.

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It is agreed, that the portions were not payable till marriage, and there is no direction in the deed that they shall be payable at marriage only, but expresly on marriage *with consent*.

Where any act is previous to any estate or trust, and consists of several particulars, every particular must be performed.

It is a known rule, that where any act is previous to any estate or trust, and that act consists of several particulars, every particular must be performed before the estate or trust can vest or take effect, and to this purpose there are many cases, but it may be sufficient to cite one only, and that is Sir *Cæsar Wood* v. *The Duke of Southampton*, *Shower's Parliament Cases*, 83, 87, which comes up to this point as to the performance of both parts.

But *the objection* which has been most relied on at the bar, was, *that* in the civil law, these restrictions are looked upon as unlawful, and that the doctrine of the civil law has been adopted into this court: I think some regard is to be had to the civil law, [375] and what *Selden* lays down in his dissertation upon *Fleta*, *lib.* 3. *ch.* 5. seems to direct how far it shall be admitted.

It will therefore be proper to take same notice of the ground of this maxim in the civil law, *that* conditions of marriage with consent, annexed to legacies, are void conditions.

It was the rule of *that law*, that nobody should devise their estate without leaving something to the heir; so also by the statute of the 32 *H.* 8. there is a particular saving of one third part not devisable: The provision of the *lex Falcidia* was, *ita detur legatum, ne minus, quam partem quartam hereditatis eo testamento heredes capiant*. And it was called *legitima portio*: this law was endeavoured to be evaded two ways, first, upon leaving the whole to the heir upon condition of marrying with the consent of such person, who it was known would never consent: secondly, Where the parties were in the power of the testator by forcing them to marry such persons only, as they could not marry with honesty and credit, so that this was looked upon as an evasion of the law; but the law always was, that where the condition was not a total restraint, as where a particular person only is excepted, *then* the condition was good.

But as it has been insisted, that *this court* has adopted this rule, I shall mention the cases on that head.

It is now fully settled, if a pecuniary legacy is given on condition of marriage with consent, and there is no devise over, such condition is void.

I take it to be now settled, that if a pecuniary legacy is given on condition of marriage with consent, *and there is no devise over*, that such condition is void, *Bellasis* v. *Ermine* (*a*). *Fleming* v. *Walgrave* and *Garret* v. *Pritty* (*b*). But none of these cases come up to the present, which is the case of a portion charged on land. *King* v. *Withers* (*c*) was also cited, but there the testator appointed two periods of time to intitle the daughter to her portion; marriage, or the age of 21, and as she had attained that age it became a vested interest.

(*a*) 1 Ch. Cas. 22, 58.
(*b*) 2 Vern. 293.
(*c*) Eq. Cas. Abr. 112.

So where the condition has been performed to a reasonable intent, the court has dispensed with the want of circumstances, as where the major part of the trustees consent, or where the

Where a condition has been performed to a reasonable intent, the court will dispense with the want of circumstances, as where the major part of the trustees consent, or where they give an implied, not an express consent.

trustees

trustees give an implied, not an express consent; so where the father has made the marriage himself (1). The case in *Moore* 857 (*a*) seems to have been determined in the ecclesiastical court, neither does it appear there was any devise over: the chief reason on which the court went in the determination of *Fleming* v. *Walgrave*, 1 *Chan. Cas.* 58. seems to be that a distinction was taken (as is said in 2 *Vern.* 573. *Creagh* v. *Wilson*,) between a condition that she shall not marry without consent, and a condition that she shall not marry against consent, or contrary to their liking: the case of *Needham* v. *Vernon* in Lord *Nottingham*'s time (*b*), seems to have been determined by consent, and though it was said in that case, that all conditions in restraint of marriage are void by the civil law, and that this court only considers them *in terrorem*, yet this is rather taken *pro confesso*, than any express determination on that point: that they are not so by the common law, is evident from the case of *Fry* v. *Porter* (*c*). The reason the court went upon in *Semphill* v. *Bailey* (*d*) was, that the condition was looked upon as a loose, inconsiderate expression, and intended to be by way of caution only, for there was no devise over.

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(*a*) Gresly v. Luther.

(*b*) Eq. Cas. Abr. 111.

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(*c*) 1 Mod. 300.

(*d*) Prec. in Ch. 562.

None of these cases however come up to the present; *pecuniary legacies* being suable for in the spiritual court, is the reason, why that law in some respects governs as to them. But it is undoubtedly true, that this court has not universally followed the maxim of the civil law, even upon this point, for it has been always agreed, that where there is a devise over, it shall take effect. It is said in this case, there is no particular devise over to any particular person, but I think it is equally strong, for it is declared the estate shall be exonerated, or if the money be raised, shall be paid to the person who is intitled to the reversion.

Pecuniary legacies being suable for, in the spiritual court, is the reason why that law governs as to them in some respects.

It is a known maxim, that where the estate is to arise upon a condition precedent, it cannot vest till that condition is performed; and this has been so strongly adhered to, that even where the condition is become impossible, no estate or interest shall grow thereon (*e*).

Where an estate is to arise on a condition precedent, it cannot vest till that condition is performed.

(*e*) Co. Lit. 206. a.

But it is said, the civil law has no such distinction as that of conditions precedent, it is true they have no such term, but they have the thing in effect: *Conditio* (they say) *suspendit legatum*, and saith *Ulpian*, *Legata sub conditione relicta non statim, sed cum conditione extiterit, deberi incipiunt; ideoque interim delegari non poterunt. Dig. lib.* 35. *tit.* 1. *De Condition. & Demonstrat. lex* 41. They distinguish between three sorts of legacies. —1*st*, A pure legacy.—2*dly*, One payable at a day future, but certain.—3*dly*, One payable on a condition that is uncertain in its event. As to the first, they say, *Dies legati venit.* As to the second *Dies cedit, sed non venit.* As to the third, *Dies nec cedit nec venit.* And in the last case, if the legatee die before the

Though the civil law has no such term as condition precedent, yet the rule in that law, *Conditio suspendit legatum*, is the thing in effect.

(1) See *Dailey* v. *Desbouverie*, post. 2 vol. 261. and note.

HARVEY v. ASTON. the contingency happens, it shall not go to his executor. *Swinb. part* 4. 12*th* & 13*th sec.*

Since the case of *Amos* v. *Horner*, the devise of the surplus of the personal estate held to be a devise over.

As to the legacies under the will, the case is more doubtful, for there is no express devise over at all, but to the person intitled to the *residuum:* And it is said in 2 *Vern.* 293. *Garret* v. *Pritty*, that the daughter shall have the whole 3000 *l.* though she married without consent, because it is not devised over, but only to fall into the surplus: but the case of *Amos* v. *Horner*, (*a*) is a later case, and it is there held, that the devise of the surplus of the personal estate, is a devise over.

(*a*) Eq. Ca. Abr. 112.

It would be a contradiction in this court to say, they are not intitled to the first, and yet to the second, which are to be paid together with, and at the time of the original portions, and are made subject to all the same *conditions, limitations and provisoes*, and it would be likewise contradicting even the course of the civil law, for by that, if a legacy is payable on a contingency, and the party dies before the contingency happens, it lapses.

[377] Lord Chief Justice *Willes:* I am of opinion, if a stranger imposed a condition, it is as strong as if a father had imposed it, and the law is not founded on the consideration of the person giving, but on the thing given; the rule is, *Cujus est dare ejus est disponere.*

Upon this case, two points have been very properly made.

First, If it was the intention of Sir *Thomas Aston*, that his daughters should have their portions, whether they married with consent or not?

Secondly, If it was his intention that they should not, then whether this intent be agreeable to the rules of law and equity?

As to the first, I think there can be no doubt, either upon the will or settlement.

As to the second point, to begin with the will, the rule is, that *voluntas testatoris totum est*, if not inconsistent with the rules of law and equity, and they should be very plain indeed, ever to defeat the intention of the testator: We must agree with *Dyer*, (says Lord Chief Justice *Treby*, 2 *Vern.* 337.) that men's wills by which they settle their estates, are the laws that private men are allowed to make, and they are not to be altered even by the King in his courts of law, or conscience.

Let us now consider the difference between a portion payable out of lands, and one payable out of personal estate, and the difference is, that if money be given to a man, payable when he comes of age, and he dies before the day of payment, it shall go to his executors; but if it be a portion to be raised out of lands, it shall sink into the estate, for the benefit of the heir. * *Pawlet* v. *Pawlet*, 1 *Vern.* 204. and 2 *Vent.* 397. and *Tourney* v. *Tourney*, *Prec. in Ch.* 290. 2 *Eq. Ca. Abr.* 654. *pl.* 6.

* Eq. Abr. 267. pl. 1. 2 Ventr. 366. Ventr. 321. 2 Ch. Rep. 286.

In the present case it must be taken to be either a condition precedent, or a limitation of the time of payment; if the first, the case of *Bertie* v. *Falkland* † is in point and that of *Fry* v. *Porter* ‡ goes farther, for there it was held that a condition subsequent

† 1 Ch. Cas. 129.
‡ 1 Ch. Cas. 138.

ſequent cannot be relieved againſt without a compenſation, which a marriage without conſent cannot have. HARVEY *v.* ASTON.

If it be taken as a limitation of the time of payment (and that ſeems the proper conſtruction), then even the civil law will not ſay they are now intitled, becauſe the time is not yet come. *Tournay* v. *Tournay*, *Pawlet* v. *Pawlet*, are in point. The caſe of *Saliſbury* v. *Bennett*, 2 *Vern.* 223. is more properly the caſe of a perſonal eſtate, but has ſome ſimilitude to the preſent, as the ſurplus was to be laid out in land; but the court there went upon this foot, that there was a diſpenſation by the father as to one part, and a conſent of the mother and truſtees as to the other part. In the caſe of *King* v. *Withers* there were two periods of time to intitle the daughter, and one of them had happened.

It is laid down as a rule that governs in deviſes of perſonal eſtates, that where there is no deviſe over, the condition is only *in terrorem*; but I rather take it this is laid down as a rule to conſtrue the teſtator's intention, but not that it is in all events a general rule, that ſuch conditions ſhall be *in terrorem* only, unleſs there are words of limitation over, for the teſtator's intent may be known other ways. [378] *Paget* v. *Haywood*, *Novem.* 1733.* does indeed contradict the opinion now declared, for there it was held that a general deviſe of the *reſiduum* or a deviſe to the perſon intitled to the *reſiduum*, were the ſame as if no deviſe over at all; but the caſe of *Amos* v. *Horner* † is to the contrary: There is indeed no decree found in the *Regiſter*, but it appears by the *Calendar* that a decree was made, but being againſt the plaintiff, I ſuppoſe has never been drawn up. The author of the book however told me, he had a note of the caſe from a very able perſon who was preſent at the hearing.

* At the Rolls before Sir *Joſeph Jekyll*, poſt. vol. 365. S. C. cited.

† Eq. Caſ. Abr. 112.

Lord Chief Juſtice *Lee* declared himſelf of the ſame opinion, and ſaid there are three ſorts of conditions to be rejected:

Firſt, ſuch as are repugnant.

Secondly, Such as are impoſſible in their creation.

Thirdly, Such as are *mala in ſe*.

But this condition of marrying with conſent does not come under any of theſe heads. And in *Fry* v. *Porter*, and 1 *Roll. Abr.* 418. it is admitted ſuch a condition is good in reſpect of land; though where a compenſation can be made, it is true, there is but little difference between conditions precedent and ſubſequent; yet where a condition is annexed to a portion in order to have a marriage with conſent, there is an equitable difference. In the caſe of a condition ſubſequent, the thing is veſted, and though in the nature of a penalty, yet the intent ſhould be clear and plain by an expreſs deviſe over to diveſt it; but in the caſe of a condition precedent, for which there can be no compenſation, it would be giving an eſtate againſt the intent of the donor to diſpenſe with the condition. Here are no words to veſt the portions in the daughters till a marriage with a conſent, and I very much govern my opinion in the preſent caſe by the particular penning of this deed, which has made this a condition pre-

The particular penning of this ſettlement makes it a condition precedent, and veſts nothing in the daughters till a marriage with conſent.

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precedent, and has vested nothing in the daughters till a marriage with consent.

The only true question upon this case seems to be, Whether such a condition as this can be annexed to a portion? For if it can, then all those cases where the portion is to sink into the inheritance are in point, and that such a condition may be annexed hath been already shewn.

As to the question upon the will, all that is material upon it is the consideration of the cases; *Bellasis* v. *Ermine* * was considered on a plea only, where the court does not use to consider matters so thoroughly, and there indeed the court looked upon it as a portion vested. But the condition in the present case does not operate by way of defeating the estate, but hindering its vesting. It appears by *Aston* v. *Aston*†, that even in the case of a condition subsequent, the length of time during which the restraint is to continue, is not a reason to relieve against a forfeiture. In the case of *Garret* v. *Pritty*‡, the portion was plainly a vested portion, and the proviso comes in afterwards, and is to be considered as a condition subsequent.

* 1 Ch. Caf. 22.

† 2 Vern. 452.

‡ 2 Vern. 293.

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A condition to marry with consent a lawful one, and being annexed to these portions, nothing can vest till that condition is performed.

Upon the whole therefore I am of opinion that a condition to marry with consent is a lawful one, and that it is annexed *to these portions*; that it is a condition *precedent*, and that nothing can vest in the plaintiffs till that condition is performed; and shall conclude with the advice of *Puffendorf*, that parents ought to use this power mercifully and cautiously§.

§ Puffend. B. 6. Ch. 2. p. 381.

It is the established rule, since the case of *Pawlet* v. *Pawlet*, that portions charged on lands do not vest till the time of payment comes. The rule that a condition to marry with consent is *in terrorem* only, where no devise over, must be understood of *legacies* only, and not of portions.

Lord Chancellor: I agree with my Lords the Judges in opinion, and do hold nothing is more fixed since the case of *Pawlet* v. *Pawlet*, than that portions charged on lands will not vest till the time of payment comes, which in this case is not till *a marriage with consent*, and there is no rule in law or equity that can excuse the want of such consent; *that* there is no such rule where they are given over, has been clearly proved, and the ordering that the estate shall be exonerated, I think is equal to a devise over. But admitting there is no devise over, then the question will be, Whether this condition is *in terrorem* only? And I own I do not know that this rule obtains so generally as has been laid down; I have understood it only of legacies, and not of portions, and of this sort was the case cited in *Moor* 857.

Portions arising out of land subject to the rules of the common law only.

These portions arise out of lands, and have nothing testamentary in them, so are not subject to the jurisdiction of the ecclesiastical court, nor to be governed by the rules of the civil law, but are subject only to the rules of the common law.

If the daughter of a freeman of *London* marry against his consent, she loses her orphanage share.

An estate may be limited to a woman *dum sola & innupta fuerit*, and this is mentioned by *Swinbourn* himself. If an infant under the wardship of the court marries without the consent of the court, it is the common practice to commit those that are concerned in it. The custom of *London* goes further, for if the daughter of a freeman marries in his life-time against his consent, unless

unless her father be reconciled to her before his death, she shall not have her orphanage part. * And this is more to the purpose here, because this custom is generally thought to have been taken up from the writ *de rationabili parte bonorum*, from whence an argument was drawn at the bar in favour of the plaintiffs in this case.

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* Foden v. Howlet, 1 Vern. 354.

If Sir *Thomas Aston* had expresly limited the term to his daughters on their marrying with consent, the term could never arise till they were so married, as is evident from the case of *Fry* v. *Porter*; and why has he not the same power over *the trust of this term*, as over the term itself?

Another material difference between portions out of lands and personal legacies, is, that in the first case, if the party dies before they become payable, they shall not be raised; in the latter, * the legacy shall go to the executor, and the ground of this distinction is, that the court for uniformity follows the ecclesiastical courts in the one case, and the common law in the other. There was another reason given for this distinction, that it is in favour of the heir, but that can be no reason at all, because in a court of justice there ought to be no favour shewn to one more than to another.

If the party dies before a portion becomes payable, if out of land, it shall not be raised; but if a personal legacy, and legatee dies before the time of payment, it shall go to the executor.

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As to the precedents that have been cited for the plaintiffs, they all of them depend upon the particular penning, or some other evidence arising upon the facts, and have not been determined upon general rules. *Fleming* v. *Waldgrave* seems to be a settlement of a leasehold estate, which, if so, was a mere personalty. *Needham* v. *Vernon* seems rather an award between the parties, than a decree in an adversary suit; for in a manuscript I have seen of Lord *Nottingham*'s, "To avoid questions (says he) "I decreed the portions to be paid, upon the giving security "by recognizance not to break the conditions." As to the reasoning in that case, I lay no great stress upon it, as it goes on a supposition that the portions were vested; and the case of *Aston* v. *Aston* goes on the same foundation.

It must be admitted on the other side, that no case, exactly in point, is cited for the defendants, the meaning of which may probably be, that the general doctrine has always been, that in case of portions arising out of land, this court can give no relief, nor can take away, or set aside such conditions as are annexed; and in the case of *Pawlet* v. *Pawlet* it was so determined.

As to the additional legacies under the will, they will fall under the rule of personal legacies, unless something is done by the testator that will prevent it; and *this is done* by annexing to them the same condition that governs the deed.

The testator mentions the legacies as an *augmentation* of their portions under the deed, which shews they are to attend the original portions; for how can they be intitled to an augmentation, if not to the thing augmented.

As to what has been said, that Lady *Aston* being residuary legatee under the will, is the person that will take benefit by refusing her consent; I shall be glad to have the opinions of the Judges, whether it may be proper to send this matter back to an

inquiry

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inquiry into the reasonableness of that refusal; for my own part I am extremely doubtful, whether I can now direct such an inquiry, as the cause stands before me. Lady *Aston* has by her answer given an account of the reasons of her refusal, and this answer not being replied to, was at the hearing read as proof, and therefore I think, I must take it, that she used all the caution in her power.

Some *unreasonable behaviour* on her part should have been proved in the cause, or some special case have been made in the bill, and unless that had been done, I do not see how I can direct such inquiry, and if no corruption appears in her, this court cannot take from her the trust reposed in her.

Upon hearing Lady *Aston*'s answer read, the three Judges were of

[381] opinion that the subject matter of the inquiry is already admitted, by the plaintiff's not replying to the defendant's answer: and therefore an inquiry now could be of no effect, and also that Lady *Aston*'s dissenting should have been made a matter of original complaint. The *Lord Chancellor* being of the same opinion, he decreed that the order of the Master of the Rolls should be discharged, but that the annuities should be paid (1).

(1) With respect to the subject of the above case, the following observations occur. When a condition in restraint of marriage affects *lands*, if such condition be *precedent*, the estate cannot *vest*, till the condition be strictly *performed*, whether there be *a devise over, or no* (*Bertie* v. *Lord Falkland*, 3 *Cha. Ca.* 129. 2 *Vern.* 333. S. C. 2 *Vern.* 220. S. C.); or if in such case the condition be *subsequent*, then the breach of the condition operates by *devesting* the estate before *vested*. 1 *Roll. Ab.* 418. pl. 6. *Fry* v. *Porter*, 1 *Cha. Ca.* 138. 1 *Mod.* 86. 300 S. C. 2 *Cha. Rep.* 26. S. C. see also *supra* 377, 378. *Pullyn* v. *Ready*, *post.* 2 vol. 587, 590. The same rule applies to such portions charged upon or interests arising out of *land*, as are not in their nature *testamentary*, or subject to the jurisdiction of the *ecclesiastical* courts. *Harvey* v. *Aston*, *supra Com. Rep.* 726. S. C. *Mansell* v. *Mansell*, 2 *Bro. Cha. Rep.* 473. But on the other hand, where a *personal* or *pecuniary* legacy is subject to a condition of marriage with consent, *and there is no devise over*, such condition is only considered *in terrorem*, whether it be *precedent*, (see particularly *Harvey* v. *Aston*, *supra* and in *Ca. temp. Talb.* 212. S. C. *Dailey* v. *Desbouverie*, *post.* 2 vol. 261. *Reynish* v. *Martin*, 1 *Wils.* 130. *post.* 3 vol. 330. S. C. *Elton* v. *Elton*, 1 *Wils.* 159. 1 *Ves.* 4. S. C. *post.* 3 vol. 504. S. C.), or *subsequent*. *Bellasis* v. *Ermine*, 1 *Cha. Ca.* 22. *Semphill* v. *Bayley*, *Prec. Cha.* 562. *Jervois* v. *Duke*, 1 *Vern.* 20. *Underwood* v. *Morris*, post. 2 vol. 184. *Pullyn* v. *Ready*, 1 *Wils.* 21. *post.* 2 vol. 587. S. C. In this last rule however a known distinction prevails as to the *operation* of a condition *subsequent* and one *precedent*; the former being *in terrorem* does not tend to *devest* the legacy before *vested* (see cases *supra*); but the latter (tho' *in terrorem* also) will necessarily prevent the legacy from *vesting*, until the marriage (*tho' without any consent obtained*) be performed. *Garbut* v. *Hilton*, *post* 381. *Atkyns* v. *Hiccocks*, *post.* 500. *Pullyn* v. *Ready*, *post.* 2 vol. 590. *Elton* v. *Elton*, 1 *Wils.* 159. 1 *Ves.* 4. S. C. *post.* 3 vol. 504. S. C. *Hemmings* v. *Munckley*, 1 *Bro. Cha. Rep.* 303. *Knapp* v. *Noyes*, *Amb.* 662. But in all cases of *personal* legacies, where there *is a devise over*, whether the condition be *precedent* or *subsequent*, the right of the *devisee over* will prevail against that of the *legatee*. *Sutton* v. *Jewke*, 2 *Cha. Rep.* 95. *Piggot* v. *Morris*, *Sel. Ca. Cha.* 26. *Bellasis* v. *Ermine*, 1 *Cha. Ca.* 22. *Stratton* v. *Grimes*, 2 *Vern.* 357. *Aston* v. *Aston*, 2 *Vern.* 452. *Wrottesley* v. *Wrottesley*, *post.* 2 vol. 584. *Chauncey* v. *Graydon*, *post.* 2 vol. 616. *Scot* v. *Tyler*, 2 *Bro. Cha. Rep.* 431. *Note*, the case of *Underwood* v. *Morris*. *post.* 2 vol. 184. (which seems

seems to be *contra*) is denied to be law, 1 *Bro. Cha. Rep.* 303. 2 *Bro. Cha. Rep.* 488. The same doctrine is equally applicable to cases, where a legacy (*personal* or *testamentary* in its *creation*) is afterwards made a *charge* upon *lands* upon performance of a condition precedent. *Reynish* v. *Martyn*, 1 *Wils.* 130. *post.* 3 vol. 330. S. C. So if a condition be *precedent*, and substitute a *lesser* for a *greater* legacy; for altho' there be *no devise over*, yet as the *greater* legacy cannot *vest* till the condition be *performed*, upon breach of such condition the *lesser* legacy will *vest*; the condition in this case not being considered as merely *in terrorem*. *Creagh* v. *Wilson*, 2 *Vern.* 572. *Gillet* v. *Wray*, 1 *P. W.* 284. *Secus* if the condition be *subsequent*. *Garrat* v. *Pritty*, 2 *Vern.* 293. *Wheeler* v. *Bingham*, *post.* 3 vol. 364. 368. 1 *Wils.* 135. S. C. If however a condition be *subsequent* (although there *be a devise over*), yet such condition may be dispensed with, if the performance of it become *impossible*. *Peyton* v. *Bury*, 2 *P. W.* 626. *Graydon* v. *Hicks*, *post.* 2 vol. 16. *Jones* v. *Suffolk*, 1 *Bro. Cha. Rep.* 529. It is observable, that the bequest of a *residue* is such a *devise over*, as to be within the above rules. *Amos* v. *Horner*, 1 *Eq. Ab.* 112. *pl.* 9. *Scot* v. *Tyler*, 2 *Bro. Cha. Rep.* 431. This was formerly held otherwise. *Semphill* v. *Bayley*, *Prec. Cha.* 562. *Garrat* v. *Pritty*, 2 *Vern.* 293. *Paget* v. *Haywood*, *supra*, 378. *post.* 3 vol. 365. *Wheeler* v. *Bingham*, 1 *Wils.* 135, *post.* 3 vol. 364. S. C.

As to cases, where the court has dispensed with the *forfeiture*, tho' the condition has not been *strictly* performed, See *Dailey* v. *Desbouverie*, *post.* 2 vol. 261, and note thereto.

November the 26th, 1739. At the Rolls.

Garbut v. *Hilton*.

PHILIPPA Downs devised (*inter alia*) as follows, "I give "and bequeath unto *Jane Garbut*, daughter of *Thomas Garbut*, the sum of 200*l.* *provided she marries with the consent and* "*approbation of her said father and mother, or the survivor of them*", and made defendant *Hilton* executor in trust for infants, who were the residuary legatees. Case 173.

S. C. 1 Ves. 5. P. D. devises to J. G. daughter of T. G. 200*l.* *provided she marries with the consent of her father and mother, or the survivor of them.*

Jane Garbut before marriage, and during the lives of her father and mother, brought her bill against the defendant as executor to have this legacy paid, alledging it was a vested interest, and the proviso of consent only *in terrorem*; there being no devise of this legacy over, if she should marry otherwise. The father and mother were made defendants to the bill, who consented the daughter should have the legacy paid to her.

J. G. before marriage, and during the lives of her father and mother, brings her bill against the executor to have this legacy paid, the father and mother by their answers consenting. Marriage here a condition precedent, plaintiff therefore too early, and bill dismissed (1).

The Master of the Rolls: This is the first bill of the sort that I ever heard of, *for a legacy given on marriage before any marriage had*. It is not to be considered as a condition merely to create a forfeiture, if she should marry without consent, but is double;

(1) *Atkyns* v. *Hiccocks*, *post.* 500. 1 *Ves.* 4. S. C. *post.* 3 vol. 504. S. C. 2 *Ves.* 5. S. C. *Pullyn* v. *Ready*, *post.* 2 vol. 590. *Elton* v. *Elton*, 1 *Wils.* 159. *Hemmings* v. *Munckley*, 1 *Bro. Cha. Rep.* 303.

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first, appointing the time when the legacy shall be due, and *secondly*, some circumstances to be observed; and tho' the court may in particular cases dispense with the circumstances, yet it must keep to the first, the appointment of the time.

If the words had stopped at *provided she marries*, it would not have vested till then; and adding the circumstance of *consent* cannot vitiate the whole condition. Every case cited establishes this general doctrine, and marriage was actually had in all of them; the present a limitation of time annexed to the substance of the legacy, and a condition precedent to the vesting, which time is not come: and consequently the plaintiff's application is too soon.

His Honour *therefore dismissed the bill.*

[382] (C) *Who are to take Advantage of a Condition, or will be prejudiced by it.*

July the 2d, 1739.

Wigg v. *Wigg.*

Case 174. S. C. cited 1 Vef. 137. E. W. devises lands to his second son *Thomas*, upon condition that *Thomas* or his heirs shall pay to his grandchildren (the children of the said *Thomas*) 90*l.* to be equally divided among them, *and in default of payment, a clause of entry and distress.* *Thomas* died in the testator's life-time, the son of the eldest son of the testator entered on the lands as heir at law, and sold them. The legacy to the children of *Thomas*, the testator's second son, is a continuing charge on the lands in the hands of the purchaser, and they are intitled to be satisfied for the same with interest (1).

EDWARD *Wigg*, by will dated the 8th of *November* 1710, devised the lands named in the pleadings, "*To his second* "*son* Thomas, *upon condition that the said* Thomas, *or his heirs,* "*shall pay and satisfy to his six grandchildren* (*the children of the* "*said* Thomas) *the sum of* 90l. *to be equally divided among them;* "*and in default of payment of all or part, there was a clause of en-*"*try and distress.*"

Thomas the devisee died in the life of the testator; the son of the eldest son of the testator entered on the lands as heir at law, and sold the lands to a purchaser for a valuable consideration.

The question was, Whether this is a continuing charge on the lands in the hands of the purchaser?

Mr. *Brown* and Mr. *Noel* who were counsel for the defendant, the heir at law of the testator, insisted, that this was only a personal condition on *Thomas*, the devisee and his heirs, there being no words in the will to give a legacy to his children, otherwise than depending on such personal condition, and that where a person claims under a will, but claims nothing except under *an estate* given by that will to another person, if such estate did never arise (as here it never did), nothing intended to be annexed to it can survive, that this was an estate given upon express terms of condition, and not within the rules of being construed a conditional limitation, as not being to be performed by him who could receive a benefit from the non-per-

(1) So *Hills* v. *Wirley*, *post.* 2 vol. 605. *Oke* v. *Heath*, 1 *Vef.* 135. 141.

formance,

formance, and that as it is not limited over, it ought to be construed strictly, as being to disinherit an heir at law, and that the beneficial interest cannot be separated from the condition, but they must both stand and fall together; and relied principally on the case in *Dyer's Reports* 348.* (Wise v. Wise.)

Lord Chancellor: I think the plaintiffs have a strong case both for their legacies and interest: There are three questions, [383]

First, If the plaintiffs have any continuing charge on the lands.

Secondly, If they are proper to come into this court.

Thirdly, If there is sufficient notice to affect the purchaser.

The two first depend on the will, and a great deal arises from the nature of the disposition in favour of the plaintiffs. It manifestly appears that the testator intended not only to make a provision for *Thomas* and his heirs, but also to make a provision for the six children who were then in being; and it would be very unfortunate, if not only *Thomas*'s heirs should lose the benefit intended, but the six children also lose their small provision by the act of God; and this is such a construction as the court never will make but when necessitated to do it. But on the contrary the present is a case so circumstanced, as will induce a court of law, as well as equity, to make as strong a construction as possible to support such a charge.

The defendants insist that this is only a condition annexed to the estate of *Thomas*, and his estate not taking effect, is void.

But this is not a mere condition, but a conditional limitation, there being an express limitation over to the legatees in case of non-payment, who were to enter and hold in the nature of tenants by *elegit* (1); and there are many nice distinctions on these conditions arising by wills. *A.* devises lands to *B.* on condition to pay *C.* a sum of money, and no clause of entry; this is no charge on the estate to give the legatee of the money a lien on the lands, but *the heir at law* shall enter and take advantage of the breach of the condition (2), and yet in this court he shall be considered only as a trustee for the legatee (3).

(*A.* devises lands to *B.* on condition to pay a sum of money, and no clause of entry; the legatee at law has no lien on the lands, but the heir of testator shall enter for a breach of the condition, and yet in this court is but a trustee for the legatee.)

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* A man having no issue, devises certain tenements in *London* to two of his friends in fee, to hold in common, upon condition that they and their heirs should pay an annual rent of 7*l.* 6*s.* 8*d.* out of the said tenements, at four quarter days, to the wife of the devisor during her life, and that if the rent should be in arrear by the space of six weeks after any of the days of payment (and lawfully demanded), that it shall be lawful for his wife to distrain upon the tenements. The rent is in arrear, and no demand made upon the tenements by the wife; and for that cause the heir of the devisor entered, and the question upon a special verdict in ejectment was, if his entry was lawful, or whether the penalty of the express condition annexed to the estate of the devisees be qualified, and altogether destroyed by the penalty of the distress, and by that means a limitation of payment of the rent to the wife, and the heir to take no advantage of the breach of the condition: the majority of the Judges clearly of opinion that the entry of the heir was lawful, and that both the penalties, (that is to say) the condition and re-entry, and the distress given to the wife for non-payment, are good remedies and sureties for the firm payment of the rent to the wife, according to the intent of her husband.

(1) *Emes* v. *Hancock*, *post.* 2 vol. 507. 509. *Sherman* v. *Collins*, *post.* 3 vol. 322.

(2) *Hil. Shep. T.* 131. 146.

(3) *Avelyn* v. *Ward*, 1 *Vef.* 423. *Hodgson* v *Rawson*, *ibid.* 47. *Sed vide* *Underwood* v. *Swain*, 1 *Cha. Rep* 161.

Wiga v. Wigg.

But then the question will be, As *Thomas* died in the testator's life-time, and the estate descended to the heir at law, if the charges continue on the lands?

I think it is the same thing; whoever entered, it was to be only till payment of the legacy, and the heir at law might in this court redeem them; but the court will not put the legatees to such a circuity, but permit them to bring a bill to have the lands sold and the money raised.

A man by will may make an equitable as well as a legal charge on his estate, and this court will maintain it against *the heir at law*.

This has been compared to a defective surrender of a copyhold pursuant to a will; but here it is different, for there the will is *void, but sure a man may, by will, make an equitable as well as a legal charge on his estate, and this court will maintain it against the heir at law, and therefore the children are intitled.

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As to the second question, *Whether the remedy is proper in this court?* it is consequential from what has been laid down before to prevent circuity.

Though a purchaser did not know of an incumbrance before he paid his money, yet as he knew it before the deed was executed, it affects him, *with notice* (1).

As to the third question, *Of notice to the purchaser*, it appears he had notice, for though he had no notice before he paid his money, yet he had notice before the execution of the conveyance, and it is all but one transaction.

I do therefore declare that the plaintiffs are intitled to the sum of 45*l.* being one moiety of the sum of 90*l.* charged by the testator's will on his estate, with interest for the same, to be raised out of the estate and decree. Let an account be taken of what is due to the plaintiffs for the 45*l.* with interest, for their respective shares from the time the plaintiffs *Anne*, *Sarah*, and *Edward Wigg*, attained their ages of 21; and in case the defendants shall not pay unto the plaintiffs what shall be so found due, then I direct the estate, or a sufficient part thereof, to be sold, and out of the money arising by such sale, the plaintiffs to be paid what the Master shall certify to be due, and the residue of the money arising by such sale to be paid to the purchaser; but this without prejudice to any remedy he may have against the defendant the heir at law to be indemnified under the covenant in the purchase deed.

(1) See *Tourville* v. *Naish*, 3 *P. W.* 306.

C A P. XXX.

Contract.

Vide title, *Catching Bargain*.

CAP. XXXI.

Copyhold.

(A) *In what Cases a defective Surrender, or the want of it, will be supplied in Equity.*

Smith v. *Baker* (1).

July the 12th, 1727.

Case 175.

A. buys a copyhold estate for his own, and two lives, in the manor of ———, where the custom was, that whoever purchases in it, the estate shall go in succession, and by his will devises all his estate, real and personal, to his wife.

THE custom in the manor of   that whoever purchases in it, the estate shall go in succession; the husband of the plaintiff purchased for his own, and two lives; and by his will, after giving some few legacies, he, in general words devises *all his estate, real and personal, in possession or reversions, to his wife.*

It was insisted for the plaintiff, that by these general words she is intitled to this copyhold estate, and that the court will supply the want of a surrender; and notwithstanding the custom of this manor, as the purchaser paid the whole purchase-money, the other two persons are to be considered as merely nominal, and that here is an implied trust for himself, though he purchased, knowing of the custom of this manor, and therefore had a right to devise it. *Clarke* v. *Danvers*, 1 *Cha. Cas.* 210. relied on as a case in point for the plaintiff.

Mr. *Fazakerly* for the defendants argued, that the successors, according to the custom of the manor, are to be regarded as *hæredes facti*, and that there are many instances where they are

(1) In 1713 the lord of the manor of *Martock* in *Somersetshire*, granted the reversion of copyhold lands within the said manor to *Gabriel Baker*, deceased, to hold the same to the said *Gab. Baker*, *John Browne*, and *W. Baker*, from and after the death of *Mary Palmer*. The bill stated that by the custom of the manor, every purchaser had an absolute power to sell, surrender, or otherwise dispose of the said copyhold premisses (this custom was admitted by the defendant *John Baker*, in case the purchaser made a *surrender* previous to such disposition) and that neither of the lives therein named, unless purchasers have such lives, are by the said custom to enjoy successively as they are named in the copy of the Court Rolls. (This custom was denied by *Baker*, in case the purchaser made no such disposition as aforesaid). *Gabriel* married the plaintiff *Joan*, with whom he received a marriage portion, but upon whom he made no settlement: after the marriage he made his will without having previously made a surrender, and thereby gave *the residue of his estate either real or personal, possessions and reversions to his wife.* The testator died, and then *Mary Palmer* died. *Joan* the widow married the plaintiff *Smith*. It was decreed, that an equitable interest passed to *Joan*, and that she should enjoy the premisses during the life of *John Baker*, who was the survivor mentioned in the said lease. *Reg. Lib. B.* 1736. fol. 476. *Vide Greenwood* v. *Hare*, 1 *Cha. Rep.* 272. *Howe* v. *Howe*, 1 *Vern.* 415. *Clarke* v. *Danvers*, 1 *Cha. Ca.* 310. *Rundle* v. *Rundle*, 2 *Vern* 252. 264. *Anon.* 2 *Freem.* 123. *Benger* v. *Drew*, 1 *P. W.* 781. *Dyer* v. *Dyer*, 1 *Cox's P. W.* 112. note 1. *Withers* v. *Withers* *Amb.* 157.

Smith v. Baker.

favoured in a court of equity, and an eſtate ſhall not be taken away from them by implication, where they are not provided for ſome other way; that it can never be imagined the teſtator, by putting reverſions in the plural number, had an intention by that one ſingle letter *S.* to paſs his copyhold, however literally the gentlemen on the other ſide may extend it to carry the copyhold.

Though the legal intereſt be according to the cuſtom of the manor, yet *A* has an equitable intereſt from being the ſole purchaſer, and ſhall be conſtrued as a truſt for him, he having advanced the money.

Lord Chancellor: The huſband of the plaintiff having purchaſed this eſtate, tho' his legal intereſt be not according to the cuſtom of the manor, yet he has an equitable intereſt from being the ſole purchaſer, and it may be brought near the caſe of a purchaſe at law of an eſtate, deſcendible to the heirs, in the name of a third perſon, yet it ſhall deſcend notwithſtanding, for it ſhall be conſtrued as a truſt for the purchaſer, he having advanced the money.

The next queſtion is, Whether, ſuppoſing there was not a general reſulting truſt, yet, as the purchaſer has made a will, and deviſed this eſtate, a court of equity will ſupply a ſurrender.

[386] The firſt conſideration, Whether theſe lands are compriſed in the will.

I think they plainly are.

Where a man deviſes all his eſtate, real and perſonal to a wife or child, and has no other real eſtate but the copyhold, it ſhall paſs by thoſe general words (1).

Where a man deviſes all his real and perſonal eſtate in poſſeſſion and reverſion to a wife or child, and has no other real eſtate but the copyhold, it will paſs by the general words; but this depends upon the circumſtances of the caſe.

There are words at the outſet of the will which have not been taken notice of, *As to all my temporal eſtate, which it has pleaſed God Almighty to bleſs me with, I diſpoſe of as follows*

Here is a plain intention to diſpoſe of his whole eſtate, and the ſubſequent words are general enough to carry it; his leaſehold eſtate for years can never ſatisfy the word real in the will, for it is called a chattel real only, as it is derived out of the real eſtate.

The next conſideration, Whether ſhe is intitled to have the want of a ſurrender ſupplied.

Where a copyhold is deviſed to the wife, the court will ſupply the want of a ſurrender, even though ſhe has a proviſion under a ſettlement.

As to the objection, that ſhe is not a wife unprovided for, it has not appeared to me there is any ſettlement; but even allow-

(1) Note, where there is a *ſurrender to the uſe of the will*, or where the deviſe operates upon the *equitable* intereſt, the general words above mentioned will always paſs copyhold lands. *Scot* v. *Albery*, *Com. Rep.* 337. 9 *Mod.* 72. 75. *Tendril* v. *Smith*, poſt. 2 vol. 85. *Carr* v. *Ellison*, poſt. 3 vol. 73. But when there is *no ſurrender to the uſe of the will*, then comes the queſtion, whether *equity* will ſupply the want of a ſurrender in favour of the deviſee; for at *law* they certainly do not paſs by the general deviſe. See *Hawkins* v. *Leigh*, poſt. 388. *Milburn* v. *Milbourn*, 2 *Bro. Cha. Rep.* 64. *Troa* v. *Downs*, poſt. 2 vol. 304.

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ing she has another provision, yet the husband might not think it sufficient, and therefore I do not look upon this case to be out of the common one, where the court will supply the surrender if he devises the copyhold to her. Smith v. Baker.

It has likewise been objected, that the court will not supply the surrender against an heir; but this rule must be applied solely to an heir in blood, and not to a hæres factus, for the defendant here is merely nominal, and not even the least relation, but barely of the same name: therefore I must decree for the plaintiff. The rule that the court will not supply a surrender against an heir, must be applied solely to an heir in blood, and not to a *hæres factus* (1).

(1) See *Hawkins* v. *Leigh*, post. 388. note.

July the 18th, 1737. Trin. Vacation.

Taylor v. *Taylor*.

A Father purchased copyhold lands in his son's name, his son being then 18 years of age, the father continued in possession till his death. Case 176. A father purchases lands in his son's name, his son being then 18 years of age, the father continued in possession till his death: this shall be considered as an advancement for the son, and not a trust for the father.

The question was, Whether this should be considered as an advancement for the son, or a trust for the father?

Lord Chancellor: I am of opinion it should be considered as an advancement for the son, and found my opinion greatly on *the case of *Mumma* v. *Mumma*, 2 *Vern*. 19. † and though two receipts are produced under the son's hand, for the use of the father, I think that will not alter the case, for the son, being then under age, could give no other receipt in discharge of the tenants who held by lease from the father; and in this case I am of opinion, parol evidence may be admitted, tho' indeed improper, when offered against the legal operation of a will, or an implied trust, but here it is in support of law and equity too (*a*). Parol evidence tho' improper, when offered against the legal operation of a will or an implied trust, *admitted* in in this case, because here it was in support of law and equity too. [*387]

(*a*) 1 Vern 467. Eq. Caf. Abr. 382. Shales v. Shales, Gray v. Gray, 1 Ch. Caf. 296.

The son had devised these copyhold lands in these words: "As to my copyhold which I have or intend to surrender to "the use of my will, I give (1), &c. and the remaining third "I give to the child or children with which my wife is now

† There the father purchased a copyhold in the name of the defendant, his eldest son, an infant of 11 years old, and enjoyed during his life, and afterwards having surrendred it to the use of his will, devised it to his wife for life, remainder to his younger children, and made other provisions for the defendant, who having recovered in ejectment, the bill was to be relieved against it. Lord Chancellor *Jefferies* conceived that he being but an infant at the time of the purchase, though the father did enjoy during his life, that the purchase was an advancement for the son, and not a trust for the father. Eq. Ca. Abr. 382. pl. 8 (2).

(1) Two thirds thereof unto my wife in fee.

(2) *Vide Stileman* v. *Ashdown*, post. 2 vol. 480.

Taylor v. Taylor.

"enseint, and to the heirs of such child or children for ever; "and if such child or children should not be born alive, or be- "ing born alive should die, without leaving lawful issue, or "before he or she has disposed of the same, I give it to my "wife."

The wife was *not* with child.

Lord Chancellor: I am of opinion it was well devised, and passed by the will, so as to have a surrender supplied, and that it ought to be construed as if he had said, *And if no child be born alive.*

His Lordship declared the copyhold estate at *Little Shellwood* was purchased by *John Taylor*, for the benefit of, and by way of advancement for *Thomas Taylor*, the son, and that in equity the plaintiffs are intitled thereto under his will, and ought to have the defect of the surrender to the use of his will supplied, and decreed the defendant, the heir at law of testator, to surrender the copyhold land to her (1).

(1) *Reg. Lib. B.* 1736. fol. 488. See 3 *Bro. Cha. Rep.* 231. 232.

November the 29th, 1734.

Avenant Hawkins, an Infant, by his next Friend, Plaintiffs.

George Leigh, *William Hawkins*, and *Elizabeth Hawkins*, Infants, } Defendants.

Case 177.

A. gives all his lands unsettled, and all his goods and chattels to his wife for life, and afterwards to his younger children in such manner as she should think fit to dispose of the same. Testator died seised of freehold lands and customary messuages, which were unsettled, and not surrendered to the use of his will. The lands settled being only freehold, naturally the lands unsettled must be the same, and therefore the copyhold lands did not pass.

EBENEZER and *Mary Hawkins* had issue, the plaintiff, their eldest son and heir, and the defendants *William* and *Mary Hawkins*. The father made his will in this manner: "*As for my wordly estate and goods*, I dispose thereof as follows, "**videlicet*, In regard a great part of my lands are already settled, "and the great tenderness and affection, and prudent manage- "ment I have always found in my wife *Catherine*, for the kindest "return and acknowledgement, therefore, I give *all my lands* "unsettled, and all my goods and chattels of what nature or "kind soever, to my said wife for life, and afterwards to my "younger children, in such manner as she shall think fit to dis- "pose of the same."

The plaintiff's father died seised of freehold lands in fee-sim- [* 388] ple, and also seised to him and his heirs of customary messuages, held of the manor of *H.* and *B.* and are *unsettled* lands, and the latter not surrendered to the use of his will.

The bill brought for an account, and that the plaintiff's interest in the several estates may be ascertained and settled.

Lord Chancellor: The only question is, as to the copyhold estate, whether it passed by the will, and this must depend upon circumstances.

Where

Where there is a general devise of lands, and there is no surrender of the copyhold lands to the use of his will, the construction at law is, that they do not pass by the will, especially, where there are other words which may answer the intention of the testator, mentioned in the will, for copyhold lands are not properly the subject of a devise, as they pass by the surrender, and not by the will.

Hawkins v. Leigh. Where there is no surrender of copyhold lands to the use of the will, they will not pass by a general devise of lands (1).

I do not think the outset of the will, *my worldly estate and goods* will carry it further than the subsequent words, *all my lands unsettled*, and all my goods, *&c.* for as the lands settled were only freehold, naturally the lands unsettled must be of the same kind: therefore I am of opinion upon the words of the will, the copyhold lands will not pass.

It has been said, a will is sufficient to pass an equity in copyhold lands, as well as an equity in freehold lands, though there should be no surrender to the use of a will; and the observation is just (2); but that is not the present case, for here there is more than an equity, because the copyhold lands actually descend upon the son, as heir to his father.

Though there should be no surrender to the use of a will, it is sufficient to pass an equity in copyhold lands.

It is the general rule of this court, that they will not supply the defect of a surrender of copyhold estates, even in favour of a wife or younger children, to the disinherison of an heir, where he is unprovided for (3).

This court will not supply the defect of a surrender of copyhold estates, in favour of a wife or younger children, to the disinherison of an heir unprovided for.

But this word *disinherison* is not merely confined to an heir who is barred of his descent; for if he is provided for by settlement, or any other way, he cannot be said to be *disinherited*; but here I do not see any provision at all for the heir.

Disinherison not confined to descent, for if an heir is provided for by settlement, or any other way, not disinherited.

I do therefore declare, that the plaintiff is intitled to the copyhold lands in question, the same not passing by his father's will.

(1) *Allen* v. *Poulton*, 1 *Vef.* 122. *Milbourn* v. *Milbourn*, 2 *Bro. Cha. Rep.* 64. *Trad* v. *Downes*, post. 2 vol. 314. See *ex parte Caswell*, post 5[illegible]0.

(2) See *Car* v. *Ellison*, post. 3 vol. 75.

(3) In the case of *Chapman* v. *Gibson*, 3 *Bro. Cha. Rep.* 229. most of the cases on this subject are collected. By that and the case of *Pike* v. *White*, 3 *Bro. Cha. Rep.* 286. it appears, that equity will supply the want of a surrender in favour of a *wife* and *children* against the *heir*, tho' not provided for by the *testator*, if *otherwise* provided for. But the same reasons do not seem to apply if the heir be *totally* unprovided for. The reader is referred to the Master of the Roll's argument in the former of the above cases, and to note 1. 1 *Cox's P. W.* 60. and *Banks* v. *Denshaw*, post. 3 vol. 585.

December the 7th, 1739.

Richard Macey and others v. *Nicholas Shurmer*.

Case 178.

N. S. by will devises to his wife and her heirs, all his freehold and copyhold lands, being well assured she would, at her decease, dispose of the lands amongst all, or *such* of his children, as by their conduct should deserve it.

NICHOLAS *Shurmer* by his will "devised to his wife, "her heirs and assigns, several lands therein mentioned, "and all his copyhold lands in *Surrey*, and his freehold and "copyhold in *Middlesex*, to his wife *Mary*, her heirs and as-"signs for ever, being well assured she would, at her decease, "dispose of the lands amongst all or such of his children as she, "in her discretion, should think most proper, and as they by "their conduct, should deserve."

The wife devises all the freehold and copyhold lands, except the copyhold in *Hampton*, to her daughter and her heirs, and *that* copyhold to the heir at law of the testator and his heirs.

Mary Shurmer, by her will, "gave to her daughter in the "following words, I hereby give and devise to my dear daugh-"ter *Martha Shurmer*, all my freehold and copyhold messuages, "lands, and hereditaments whatsoever (except the copyhold "in *Hampton* aforesaid), to hold to my daughter, her heirs and "assigns for ever, subject nevertheless to the payment of the "just debts that are still due and owing from my late husband, "and also to the payment of my own just debts. And I give "to my son, *Nicholas Shurmer*, and to his heirs and assigns for "ever, *all that copyhold messuage, with the appurtenances, in the* "*manor of* Hampton. And I give to my daughter, *Martha* "*Shurmer*, all my goods and chattels whatsoever, and do make "her my sole executrix."

Testatrix gave directions for surrenders of the respective copyhold estates to the use of the will, but died before they were perfected. The heir not being totally unprovided for, the court supplied the surrender. The word *such*, gave the wife the power to devise the whole to one child, if she had thought fit.

At the time of her executing the will, the testatrix gave directions that the surrender to the use of the will should be drawn up by two copyholders of the respective manors, but no such tenants being present, the same, though written, was not perfected; she afterwards went to the steward, but he was not in town, for the surrender to be presented, and she soon afterwards died suddenly.

The defendant, the heir at law, insists the copyhold estates belong to him, for want of a surrender (1).

Therefore the end of the bill was to restrain defendant from being admitted tenant to the copyhold, and that the freehold and copyhold lands, or a sufficient part, may be sold, and the money paid to the plaintiffs, the creditors, and the remainder to *Martha*, the only child unprovided for.

Lord Chancellor: It is clear, that under the word *such* of his children, the wife of the testator, though a trustee in some sort, had a full power to devise the whole to the daughter (2), if she had thought fit.

(1) The bill was brought by the creditors of *Nicholas Shurmer* and *Mary Shurmer*, the freehold and copyhold estates being purchased with the money lent by the creditors of the former. *Reg. Lib. B.* 1739. fol. 75.

(2) See *Swift* v. *Gregson*, 1 *Durn.* and *East*, 432.

As to the want of a ſurrender, the wife being no more than a truſtee, the truſt only of a copyhold not neceſſary to be ſurrendered, but if it was neceſſary, I ſhould be inclined to ſupply it.

Macey v. Shurmer.

The truſt of a copyhold not neceſſary to be ſurrendered (1).

I think it might have been doubtful, whether the mother could have ſubjected the eſtate for payment of her own, or even her huſband's debts, but the deviſee of the wife ſubmitting to that, and deſiring it might be ſold for payment of debts, the court will not interpoſe.

If the heir had been totally unprovided for, I ſhould have doubted, whether a ſurrender could be ſupplied; but it appearing that one copyhold deſcended to him, and another had been deviſed under the mother's will, and no proof of the value, I cannot refuſe to ſupply the ſurrender.

I do therefore declare, that the wills of *Nicholas Shurmer*, and *Mary Shurmer* are well proved, and ought to be eſtabliſhed, and do decree that a ſufficient part of the freehold and copyhold, deviſed to plaintiff *Martha*, be ſold, and the money applied in ſatisfaction of the creditors of *Nicholas* and *Mary Shurmer*, and the ſurplus to be paid to *Mary Shurmer*, and in caſe part of the copyhold remains unſold, I direct that the defendant do ſurrender the ſame to *Martha*.

(1) See *Car* v. *Elliſon*, poſt. 3 vol. 75.

Ex parte George Caſwell.

Auguſt the 18, 1744.

Vide title *Power, under the Diviſion, Of the right Execution of a Power, and where a Defect therein will be ſupplied.*

Vide title *Bankrupt, under the Diviſion, Rule as to Copyholds, under Commiſſions of Bankrupts.*

C A P. XXXII.

Creditor and Debtor.

(A) *What Conveyance or Disposition shall be fraudulent as to Creditors.*

(B) *What Conveyance or Disposition shall be good against Creditors.*

(C) *General Cases of Creditors and Debtors.*

(A) *What Conveyance or Disposition shall be fraudulent as to Creditors.*

November the 27th, 1738.

Edward Russel, *William Hayward*, and others — Plaintiffs.
Elizabeth Hammond and others ——— Defendants.

Vide title *Agreements*, *Articles*, *and Covenants*, *under the Division*, *Voluntary Agreements*, *in what Cases to be performed.*

November the 6th, 1745.

Walker and others v. *Burrows.*

Vide title *Bankrupt*, *under the Division*, *Rule as to Assignees.*

(B) *What Conveyance or Disposition shall be good against Creditors.*

October the 25th, 1744.

Brown v. *Jones* and others.

Vide title *Bankrupt*, *under the Division*, *Where Assignees are liable to the same Equity with the Bankrupt.*

October the 27th, 1746.

Brown v. *Heathcote.*

Vide title *Bankrupt*, *under the Division*, *The Construction of the Statute of* 21 Jac. 1. cap. 19. *with respect to Bankrupt's Possession of Goods after Assignment.*

(C) *General Cases of Creditors and Debtors.*

Frederick v. *Aynscombe.*

December the 5th, 1739.

Case 179.

S. C. post. 627. but not S. P. S. C. 2 Eq. Cas. Abr. 594. note. S. P.

BY articles previous to the marriage of the defendant's son *Philip* with *Valentina Wight*, the defendant covenants, that he, his heirs, his executors or administrators would, at the end of three years after the solemnization of the marriage, or on *Valentina*'s attaining 21, pay to *Roberts* and *Malyn*, their executors, &c. 12,000*l.* or convey to defendants, their heirs, &c. lands in fee simple within 50 miles of *London*, to make up the value, as the plaintiff should not pay in ready money.

A father, by articles previous to the marriage of his son, covenants at the end of three years after the solemnization thereof, to pay to trustees, their executors, &c. 12,000*l.* to be settled to husband for life, to the wife for life; then to the use of the first and other sons in tail male, *remainder to the daughter and daughters in tail general*, remainder to the right heirs of the husband.

Provided, if there should be but one daughter, and no other child, and the heirs, &c. of the husband should, *within three calendar months after his death*, pay to the trustees 4000*l.* Then all the uses limited *to such daughter*, and the heirs of her body in the 12,000*l.* should cease and be void, and from thenceforth should be to the use of the heirs and assigns of the husband.

The husband dies, leaving no child but a daughter, and by will devises the 12,000*l.* and all his property in the same, and to the lands to be purchased therewith, subject to the trusts, to the defendant, his heirs, &c. and appoints him executor. He lets the three months elapse, without paying the 4000*l.* and denies he ever had assets sufficient to have paid it.

The plaintiff, a judgment creditor of the husband, bri[illegible] bill to be paid principal, interest, and costs, out of the personal assets, and if not sufficient, insist[illegible] husband's reversionary interest in the 12,000*l.* ought to be deemed real assets, and applied in [illegible] of his demand.

The reversionary interest in the 12,000*l.* together with the [illegible] of discharging the same from the estate tail limited to the daughter, is to be considered as real as[illegible] the plaintiff, notwithstanding the three months lapsed without payment of the 4000*l.* ought not [illegible] prejudiced thereby, but let into the benefit of the redemption (1).

To be settled to *Philip Aynscombe* for life without impeachment of waste, to *Valentina* for life, without imp[illegible]ment of waste; then to the use of the fi[illegible] and every oth[illegible] of the marriage, and the heirs mal[illegible] their bodies in tail [illegible] remainder to the daughter and da[illegible]rs of the marriage, and [illegible] heirs of their respective bodies, [illegible] to the right heirs of *Philip*.

And by the said artic[illegible] should happen to be but *one daug*[illegible] and no other child of the said *Philip Aynscombe*, by the said *Valentina*, and the heirs, executors, or administrators of the said *Philip Aynscombe*, should, within three calendar months after his death, pay to *Roberts* and *Malyn*, the trustees therein named, the sum of 4000*l.* Then all the uses and estates therein before limited to such daughter, and the heirs of her body, in the lands and hereditaments to be purchased with the 12,000*l.* or of the 12,000*l.* in case no lands were purchased, should from thenceforth cease and be void, and that from thenceforth the 12,000*l.* or the lands purchased should be to the use of *Philip Aynscombe*, his heirs and assigns for ever. [393]

Philip Aynscombe dies, having no other child than a daughter, an infant, and by his will had devised his manors, messuages,

(1) See *Wallis* v. *Crimes*, 1 *Cha. Ca.* 89. 1 *Eq. Ab.* 107. *pl.* 1.

lands,

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lands, &c. in possession or reversion, remainder or expectancy, and also the sum of 12,000 *l.* and all his property in the same, and to the lands to be purchased therewith, subject to the trusts in the said articles, to the defendant *Aynscombe*, his father, his heirs, executors, and assigns, and appointed him and *Wall* executors.

The defendant, *Thomas Aynscombe*, let the three months elapse after the death of *Philip*, without paying the 4000 *l.* to revoke the uses limited by the articles to the daughter, and denies that he ever had assets of *Philip Aynscombe* in his hands sufficient to have paid the 4000 *l.*

The plaintiff, who was a creditor of *Philip Aynscombe*, by two several judgments, in large sums of money, brought his bill against the defendant as devisee of the real estate, and executor under the will of *Philip*, to be paid his principal, interest, and costs, out of the assets of the testator, and insisted, that if the personal were not sufficient, that *Philip*'s reversionary interest in the 12,000 *l.* agreed by the marriage articles to be laid out in land, together with the benefit of discharging the same from the estate-tail limited to the daughters ought to be deemed real assets, and applied in payment of the plaintiff's demands.

Lord Chancellor: There are, in this case, two points to be considered.

1st, What is the true construction of the marriage articles.

2dly, What equity arises to the plaintiff and judgment creditor out of these articles.

The articles in the whole are very oddly penned, but however the proviso in them, is the single foundation for the present question, and the doubt is, what may be the proper construction, whether *the daughter* shall have the estate tail absolutely upon the failure of issue male, or whether it shall be considered only as a security for the payment of the 4000 *l.*

And I am of opinion, that from these words in the articles, "if there be one only daughter, and no other child of the marriage, and the heirs, executors, or administrators of *Philip* "should, within three calendar months after his decease, pay "to the trustees the sum of 4000 *l.* Then all and every the

[394] "uses, &c. before limited to the daughter in the 12,000 *l.* should "cease." That it was intended merely to create a security for the 4000 *l.*

There is no trust declared of the 4000 *l.* and to be sure the articles are inartificially drawn, but however the court must put a reasonable construction on this proviso.

If the bill had been brought in the life-time of *Philip*, the court would have construed it as a security only for the 4000 *l.* and perhaps this is more for the daughter's advantage than any other, for she might otherwise wait till the death of her mother, before she received any thing, and now she will have the 4000 *l.* at all events.

Though the 12,000 *l.* did not originally move from *Philip Aynscombe*, yet it is to be laid out for the benefit of *Philip* and his

The husband, by purchase from his father, is made owner of the fee in the estate to be bought with the 12,000 *l.* and therefore in nature of a right of redemption in the son, and not a mere naked power.

his family, and *Philip*, by purchase from his father, is made owner of the fee in this estate, and therefore it is in nature of a right of redemption in the son, and not a mere naked power; it might have been a very considerable point, if this reversion had been sold in the life-time of *Philip Aynscombe*.

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As to the second point, *What equity arises to Mr.* Frederick, *the plaintiff and judgment creditor, out of these articles.* I am of opinion that he must be relieved, notwithstanding the three months after the decease of *Philip* (in which time, by the articles the 4000*l.* was to be paid *to the daughter*, by his executors) are actually expired. The case of *Marks* v. *Marks*, *Eq. Caf. Abr.* 106. is very strong to this purpose (1).

The heir or executors of the testator not doing it, can never be to the prejudice of a fair creditor, and to determine it so would be contrary to all rules of equity; for if the heir or executor will not pay within the time limited, the creditor shall be admitted to do it himself; and so it is laid down in the case of *Jordan* v. *Savage*, *Nov.* 17th, 1732, before Lord *Talbot* (2).

Where an heir or executor have omitted to do an act within a limited time, it shall never be to the prejudice of a creditor, but he shall be admitted to do it himself.

Upon the whole, the plaintiff shall have this right of redemption, but it is certain, as to the manner of it, he cannot have it to the prejudice of the widow, nor can he intitle himself to it, but upon payment of the 4000*l.* with interest, to the daughter, at the rate of 4*l per cent.* from her father's death.

His Lordship therefore directed an account to be taken of what was due to the plaintiff, for principal, interest, and costs on his two judgments, and an account also of the personal estate of *Philip Aynscombe*, and the plaintiff to be paid out of the personal estate, but if that is not sufficient, then the real assets of *Philip* to be applied.

And his Lordship declared, that the reversionary interest of the 12,000 l. *agreed by the marriage articles to be laid out in land, and settled as mentioned, together with the benefit of discharging the same from the estate-tail, agreed to be limited to the daughter, ought to be considered as part of such real assets.*

And that the defendant, *Thomas Aynscombe*, the executor of *Philip*, not having paid the 4000*l.* within the three months mentioned in the articles, the plaintiff being a judgment creditor of *Philip* ought not to be prejudiced, but is intitled to be let into the benefit of such redemption. [395]

And directed that an account should be taken of the 4000*l.* and interest, and upon payment thereof within 6 months after the report made, by the plaintiff, to a trustee to be appointed by the Master, he declared that 12,000*l.* and 11,027*l.* *South-sea* annuities that had been purchased therewith, were discharged and exonerated from the limitation in tail to the daughters, and that the same be sold, and that the money arising by such sale be applied in satisfaction of what the plaintiff shall pay for the sum of 4000*l.* and in the next place, in satisfaction of

(1) *Prec. Cha.* 486. S. C. 10 *Mod.* 419. S. C. 1 *Stra.* 129 S. C.

(2) 2 *Eq. Ab.* 101. *pl.* 8. S. C.

what

Frederick v. Aynscombe. shall remain due to the plaintiff for principal, interest and costs upon the two judgments, and the surplus of the money arising from the sale of the *South-sea* annuities, be paid to *Thomas Aynscombe*, in part of his testators' real estate.

☞ *Vide* 2 *Rolls Rep.* 304 Sir *Robert Dudley*'s case cited in the cause of Sir *Christopher Hatton*, and Sir *Edward Coke*, which was mentioned by Mr. *Frederick*'s counsel, seems to be a very strong case for him (1).

(1) That case was in effect thus. Sir *Robert Dudley* 7 *Jac.* 1. made a feoffment with a *power of revocation*, and having afterwards forfeited all his lands to the crown, it was held, that this *power of revocation* (and by the exercise of it, of course the *lands*) vested in the king by the forfeiture. See 2 *Roll's Rep.* 304.

April the 12th, 1747.

Ex parte Grove.

Vide title *Bankrupt, under the Division, Rule as to Landlords.*

Easter term, 1737.

Powell v. *Monier.*

Vide title *Trade and Merchandize.*

Vide title *Executors and Administrators, under the Division, What shall be Assets.*

Vide title *Devises under the Division, Devise of Lands for Payment of Debts.*

Vide title *Bankrupt, under the Division, Rule as to Partnership.*

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C A P. XXXIII.

Costs,

February the 19th, 1738.

Deggs v. *Colebrooke.*

Case 180. Upon payment of 20*s.* costs, bills may be amended after answer put in,

LORD *Chancellor* said in this cause, that he would not, in any one particular case, oblige a plaintiff to pay more than 20*s.* cost to a defendant (after answer put in) on the amendment but *Lord Chancellor* said he would consider how to make a more adequate compensation to a defendant for the future, after a long answer, and other necessary proceedings on the part of the defendant (1).

(1) Tho' a plaintiff amends his bill several times, yet he shall not pay *taxed* costs, but only 40*s.* unless it be a case of particular oppression. *Masserene* v. *Lyndon*, 2 *Bro. Cha. Rep.* 291.

of the bill, becauſe it had been the conſtant rule of this court, and eſtabliſhed at firſt, to prevent the inconvenience of entering too largely into the merits of the cauſe, before the proper time for hearing the merits. Deggs v. Colebrooke.

In Lord Chancellor *King*'s time, there was an attempt to vary from this rule, but it did not anſwer; but Lord *Hardwicke* ſaid, he would notwithſtanding conſider how to make a defendant ſome amends for being put to a great expence, by allowing him a more adequate compenſation, than only twenty ſhillings coſts, on the plaintiff's amending his bill, after a long anſwer, and other neceſſary proceedings on the part of the defendant.

Vide title *Bankrupt, under the Diviſion, Rule as to Coſts.*

Vide title *Evidence, Witneſſes, and Proof.*

Vide title *Charity.*

C A P. XXXIV. [397]

Courts and their Juriſdiction.

(A) *How far Chancery will or will not exert a Juriſdiction in Matters cognizable in inferior Courts.*

Ex parte Butler and *Purnell*, Aſſignees of *Edward Richardſon.* *Auguſt* the 3d, 1749, and *December* the 22d, 1749.

Vide title *Bankrupt, under the Diviſion, Rule as to the ſale of Offices under a Commiſſion of Bankruptcy.*

C A P. XXXV.

Court of Chivalry.

Vide title *Canon Law.*

C A P. XXXVI.

Curteſy.

Vide title *Tenant by the Curteſy.*

CAP. XXXVII.

Custom of London.

(A) *Concerning the custom with respect to the children of a freeman, and here of advancement, bringing into hotchpot, survivorship and forfeiture.*

(B) *What disposition made by a freeman of his estate shall be good, or void, being in fraud of the custom.*

(C) *What is or is not an advancement.*

(A) *Concerning the custom with respect to the children of a freeman, and, here of advancement, bringing into hotchpot, survivorship and forfeiture,*

June the 18th, 1737.

Metcalf v. *Ives.*

Vide title *Award and Abritrament, under the Division, For what Causes set aside.*

[399] (B) *What disposition made by a freeman of his estate shall be good, or void, being in fraud of the custom.*

February the 3d, 1737.

Samu. Morris and *Elizabeth* his Wife, — Plaintiffs.

Gyles Burroughs and *John Burroughs*, *Samuel Wollaston* and *Mary* his Wife, *Edward Rose* and *Ann* his Wife, — — Defendants.

Case 181. S. S. post. 2 vol. 617. 2 Eq. Caf. Abr. 272. pl. 30. S. C. Vin. Abr. 221. pl. 19. n. S. C.

A father having five children, three of age, and two infants, enters into an agreement with them, that he would come to *London* and take up his freedom, provided they would release any right or demand they may be intitled to, in respect of the father's personal estate, by virtue of the custom of the city of *London*. An agreement drawn up and executed by the father and the three children who were of age. The bill brought by the plaintiff, and his wife, one of the daughters who was of age at the time of the agreement, for her customary share of the father's estate, he having in his life time taken his freedom (1).

JOHN Burroughs, having five children, and living in the country, enters into the following agreement with them, which was drawn up and executed by the father and three of the children, who were then of age; the other two were infants, and therefore it was not executed by them.

(1) By 11 *Geo.* 1. *c.* 18. *f.* 17, it shall be lawful for all persons, who after the 1st *June* 1725, shall become free of the city, and for all who at that day shall be unmarried, and not have issue by any former marriage to dispose of their personal estate.

The

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The agreement, dated the 11th of *September*, 1718, recites, "Whereas *John Burroughs* of *Thame*, in the county of *Oxford*, "draper, is of opinion he may greatly improve his estate by following his trade in the city of *London*; and for the better performing the same, apprehending it necessary to buy his freedom of the said city: And whereas the said *John Burroughs* is "informed, that in case he could purchase his said freedom, he "should thereby disable himself from absolutely giving, or disposing of his personal estate by will or otherwise, in such "manner (to and among his children) as he can now do, not "being a freeman: And whereas we whose names are hereunto "subscribed, children of the said *John Burroughs*, are desirous "our said father should become a freeman of the said city, in order to improve his estate, and are contented and agreed that "our father should have and retain to himself full power "and authority to give and dispose of his personal estate, in such "manner as if he was not a freeman of the said city: *Now know* "*all men by these presents*, that we *George Burroughs*, *Elizabeth* "*Burroughs*, and *Phillis Burroughs*, children of the said *John* "*Burroughs*, do hereby for ourselves, executors, administrators "and assigns, severally and respectively release, discharge and "disclaim any right, title, interest, claim, and demand whatsoever, of, in, and to all and every part of the personal estate of "the said *John Burroughs*, that he shall die possessed of." And they agree that if *John Burroughs* the father shall leave a will, they will not claim any other share of the estate than what shall be given respectively to them by such will; but upon payment of what shall be respectively given them by such will, they respectively, and their respective executors, &c. will execute a release of all claims, &c. to any part or share of the personal estate of their father, whereof he shall be possessed at the time of his death. [400]

John Burroughs the father removed to *London*, and in 1718 became a freeman, and continued so to his death; and having made a will, thereby declared, that in case any of his children, their husbands or representatives, should not abide by his will, but endeavour to have his estate divided according to the custom of *London*, and should not execute to his executors, within six months after his decease, *releases* of all claims to any part of his personal estate, under the custom of *London*, that then the legacies thereby given for the benefit of such children, and to their husbands, child, or children, shall be void and sink into the *residuum* of his personal estate. He appointed *Gyles Burroughs* (among others) his executor, who has alone proved the will.

The bill is brought by the plaintiff and his wife, one of the daughters of *John Burroughs*, who was of age at the time of the agreement, and party thereto, in order that the agreement and will may be set aside, (in regard the plaintiff *Elizabeth* and her brothers and sisters had no consideration for the agreement, but was a mere involuntary act, being intirely under their father's power) and also that *Gyles Burroughs* may account with the plaintiffs for the testator's personal estate, and that he having given

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given the plaintiff *Elizabeth* no more than 900*l.* on her marriage, which is far short of what he gave the rest of his children, that the plaintiffs may be at liberty to bring their advancement into hotchpot, and be paid their customary shares of the testator's personal estate, and also their shares of the dead man's part.

The defendant *Gyles Burroughs* admits he was advanced in his father's life-time with 1800*l.* and submits, whether, by virtue of the agreement, the testator had not a power to dispose of his personal estate, and that the reason the defendant and his sister *Ann Rose* did not execute the same, was, because they were both under age at the time of the testator's purchasing his freedom.

The defendant *John Burroughs*, by his answer sets forth, that his father advanced him 1500*l.* and no more, over and above 100*l.* that his father made a present of to his wife soon after the defendant's marriage, and which he insisted ought not to be reckoned any part of his advancement, nor what his father has made presents of to this defendant's children.

The defendant *Samuel Wollaston* and *Mary* his wife, who was one of the children of *John Burroughs*, insisted, that a farm called *Brill*, in *Buckinghamshire*, purchased by *John Burroughs* at the time of *Mary*'s marriage, and settled on *Samuel* and the uses of the marriage, ought not to be considered as money advanced by the father, but as a settlement of real estate, and therefore is not to be brought into hotchpot.

For the plaintiff it was urged, there was no colour that the words of *release* in the agreement could operate as such, [401] even tho' the father, at the time of the agreement, had been a freeman, there being no pretence of any right to any part of the father's estate vested in any child, whereon the release could operate; much less as the father here was not so much as a freeman at that time, nor could this agreement be binding as such in a court of equity, for want of a consideration; and likewise the inequality of the thing with regard to the children among themselves, that three of them should thereby be deprived of their orphanage part, and the other two by that means might have ingrossed the whole.

E contra, It was insisted, though this should not be good as a release for the reasons given, yet that it was binding as an agreement: That this bill was brought to deprive the parties of the legal remedy which they had at law for breach of the covenant, and is a very different case from what it would have been, if the bill had been brought to carry the agreement into execution: That here was a consideration moving from the father, the disability he laid himself under with regard to any wife, and two of his children, of disposing of his estate at his discretion: That the father, in confidence of this agreement, took up his freedom, and the agreement was thereby executed on his part; there was no reason therefore why the children should be discharged of their engagement: That on the marriage of the plaintiff *Elizabeth*, and 900*l.* given her as a marriage portion, the

father

father very probably would have taken care to have declared, and settled that on her, expressly in exclusion of her from any orphanage share, if he had not apprehended she was before barred of any claim. That the plaintiff cannot now object to the infancy of the other children, being as fully apprized of that at the time of entring into the agreement. Morris v. Burroughs.

Lord Chancellor: As to the objection that this being a voluntary agreement, a court of equity will not interpose, it is certainly a general rule, where it has been entred into without any fraud, but is not applicable to this particular case, for here the bill is brought to have a distribution of the orphanage share which the plaintiff is intitled to, and is a legatee likewise under the will of her father; and the whole matter appears on the face of the proceedings. The plaintiff therefore has a right, in one capacity or the other, to part of the personal estate of the father, and has taken a proper method in applying to this court for the recovery of it, and I must of necessity determine the merits of this case one way or other; and as incident thereto must enter into the nature of this agreement, and consider the validity of it, without having any regard to its being voluntary or not. This is frequently done in similar instances; in the case of an equity of redemption, no decree can be made without determining first in whom the right of redemption is. The same likewise where the benefit of a trust is in controversy between two volunteers.

A court of equity will not interpose in voluntray agreements, where they have been entered into without fraud.

As to the agreement, the question is, How far it is binding, and in the first place, if it may operate as a release? It has been *rightly given up, at the bar, that it cannot, for want of an interest in the children, for any release to operate upon, because the children had neither *jus in re*, nor *ad rem*, the whole being in the father during his life (1); and this point has often been determined, where a release has been given by a child to a parent, *tho' a freeman at the time*; *a fortiori*, ought the rule to hold here.

The agreement could not operate as a release, for want of an interest in the children for it to operate upon; for they had neither *jus in re*, nor *ad rem*, the whole being in the father during his life.

It is said the act of the father in taking up the freedom, was a consideration moving from him towards the children; but the father does not so much as covenant by the agreement to take up his freedom. The *recital* is, that the father was of opinion he could improve his fortune by so doing; but whether he would do so or not, was a matter altogether in his discretion, so that he might have taken it up at a period of life most agreeable to himself, or not at all: Nor can that act of his, at that time, be considered as a thing beneficial to the children; for supposing the agreement to be binding, whatever acquisitions he made would have been entirely at his own disposal; he might spend every shilling of it, might invest it all in land in order to [*402]

(1) Tho' it could not operate as a *release*, yet it might as an *agreement*, if made upon a valuable consideration. *Blundell* v. *Barker*, 1 *P. W.* 639. 646. *Cox* v. *Belitha*, 2 *P. W.* 273. *Lockyer* v. *Savage*, 2 *Stra.* 947. *Metcalfe* v. *Ives*, *ante* 64.

Morris v. Burroughs. evade the custom; so that any advantage accruing to the children must be merely contingent and accidental.

But the most material part of this case, and what I lay the greatest stress upon, is, that the end proposed by the agreement was nugatory, and could not possibly be obtained on either side, for want of making all the children parties to the agreement, which could not be done here, two of them being infants; this affects the consideration of the agreement, with regard to the children among themselves; for if the two who were infants did not consent when they came of age, they then might have engrossed the whole orphanage part in exclusion of the rest.

Agreements of this kind ought not to receive any encouragement, and it was founded manifestly on a mistake of the father. It is a rule in equity to relieve against such agreements as are founded on mistakes. The custom of *London* admits of no such bar, for nothing but actual advancement of a child will have that effect. But if a daughter, who has a portion given by a father on marriage, agrees to take it in satisfaction of any demand she may afterwards have on his estate, this amounts to a bar.

The agreement is founded likewise manifestly on a mistake of the father, and must, in the nature of the thing, be altogether ineffectual, the father being under the same difficulty of disposing of his estate, as he would have been though no such agreement had been made. Agreements of this kind ought certainly to receive no encouragement or favour, and it is a rule in equity to relieve against such as are founded on mistakes. The custom of *London* itself admits of no bar of this kind; nothing but an actual advancement of a child by a father will have that effect, where the money is declared to be given as such, and the *quantum* of money not ascertained. Courts of equity have indeed gone further, that when a father on the marriage of his daughter has given her a portion, and *that* is agreed between the parent and child to go in satisfaction of any demand the child may afterwards have on the father's estate: This has been held to amount to a bar of any claim of that kind, and was so determined in the case of *Metcalf* v. *Ives*.*

* *Vide ante* 63.

A father's preferring a child in marriage, or advancing money to set up a son in trade, may amount to a bar of his customary share; but in all these instances there must be a valuable consideration moving from him, and an actual benefit accruing to the child.

*It was so held also in the case of *Blundel* v. *Barker* (*a*) at the Rolls, tho' on appeal to Ld. *Macclesfield*, the matter was never finally determined†; and there is a great deal of reason this should be so, for the children have no right till after the death of the father, his advancement of a sum of money for their preferment in marriage, is a meritorious act in the father, and a valuable consideration moving from him. I should think likewise, if a father should give money to put a son out apprentice, or advance him in life by setting him up in trade, &c. that would have the same effect (1). But as the parental authority is great, to *prevent* any undue influence it may have in prejudice of the children, there must, in all instances of this kind, be a valuable consideration moving from the father, and an actual benefit accruing to the child (2).

(*a*) 1 *P. W.* 634.
† *Lucas's Cases in Law and Equity*, 455.

[*403]

However, in the present case, what I ground my opinion upon, is, that the children are not, nor could they all of them be, made parties to the agreement; if they had been all of age, and had entered into this agreement, such a case might fall under

(1) *Hall* v. *Hall*, 2 *Vern*. 277. See *Smith* v. *Fellowes*, *post*. 2. vol. 62. 377.

(2) See *Heron* v. *Heron*, *post*. 2. vol. 160.

er very different considerations; but two of them being infants, leaves it open to several chasms and absurdities.

MORRIS v. BURROUGHS.

As to what is insisted on by the defendant *Woollaston*, (he having signed a note given to the father to this effect, *Received*, &c. 778*l.* 15*s. being so much more money advanced for my wife's fortune*; and by his answer confessing that 638 *l.* the purchase money of the estate so settled was included in the 778 *l.* 15*s.*) *Lord Chancellor* held clearly that transaction was to be considered as money advanced by the father, and must be brought into hotchpot. It was resolved in this case likewise, that where a wife is compounded with on marriage, by having a jointure settled on her in lieu of her customary share, or has some other equivalent given to bar her of such claim, the husband in such case is not to be deemed a purchaser of her third, so as to have a right of disposing of it in prejudice to the children, and they to come in only for a third part as their orphanage share. But it is to be considered as if there was no wife in the case at all, and the orphanage share then becomes a moiety of the father's estate (1).

A on his marriage with one of the daughters of *John Burroughs*, had an estate in land settled on him, but signed a note to the father as a receipt for so much more money advanced for his wife's fortune; this must be considered as money, and brought into hotchpot.

Where a wife is compounded with on marriage, by having a jointure in lieu of her customary share, the husband shall not be considered as a purchaser of her third, but the orphanage share shall then be a moiety of his estate.

It was likewise resolved, that where money is expressed to be advanced in part of a fortune, though of small amount, yet it must be looked upon as an advancement; but if petty sums are given, at different times, by a father to a child, and not said to be as a portion, but by way of present, or otherwise, they are not to be brought into hotchpot; and so determined in the case of *Whitcombe* v. *Whitcombe* at the Rolls, 1718, with which the *Lord Chancellor* concurred (2).

Where money is expressed to be given in part of a portion, tho' of small amount, yet it is an advancement, and must be brought into hotchpot.

The father in this case had reserved an annuity to himself, out of the estate purchased by him, and settled on the marriage of his daughter to one of the defendants as before mentioned, and on the question, Whether in the money to be brought into hotchpot a regard ought to be had to that annuity so reserved, and the defendant for that reason not obliged to bring the whole money into hotchpot? *Lord Chancellor* held clearly that the whole must be brought in, and it was agreed to have been so determined in the case of *Edwards* v. *Freeman* (3), that all must be brought in which the child was intitled to at the death of the father, for at that time the annuity ceased.

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The children who were infants at the time of the agreement, but are now of age, having a large share of the father's estate under the will were very ready and willing to acquiesce under the agreement; but it was held clearly, the validity of the agreement

An agreement must depend on the circumstances at the time, and cannot be made better or worse by subsequent facts.

(1) *Metcalf* v. *Ives*, *ante* 64. note 4.

(2) See *Hume* v. *Edwards*, *post.* 3 vol. 452, and 3 *P. W.* 317. *n.* O.

Elliot v. *Collier*, 1 *Vef.* 16. *post.* 3 vol. 528. S. C.

(3) 1 *Eq. Ab.* 249. *pl.* 10. 2 *P. W.* 435. S. C.

Morris v. Burroughs.

must depend on the circumstances of things at the time the agreement was made, and cannot be made better or worse by any subsequent facts.

A provision by will that a legatee controverting the disposition of the estate shall forfeit his legacy, is *in terrorem* only.

There was a provision made by the will, that any legatee controverting the disposition the testator had thereby made of his estate, should forfeit his legacy, this was held clearly to be *in terrorem* only, and that no such forfeiture could be incurred by contesting any disputable matter in a court of justice (1).

A person cannot take by the custom, and under the will.

The plaintiffs must renounce the legatory part, for there can be no taking by the custom, and under the will too, in any instance whatever (2).

His Lordship declared the agreement of the 11th of *September* 1718 was voluntary, and, under the circumstances of the present case, ought not to be considered as binding between the testator and his children, and that the plaintiffs are intitled to their customary share of the orphanage part of the said testator's estate, which is a moiety of the clear personal estate, but that they, electing to claim by the custom of *London*, are not to have any benefit by the testator's will, and that 630*l.* paid by the testator for the farm at *Brill* in *Buckinghamshire*, for the defendant *Mary Woollaston*, is to be looked upon as so much money paid towards her advancement; and therefore ordered an account to be taken of the personal estate of the testator come to the hands of his executors; and after such account shall be taken, the defendants *Gyles* and *John Burroughs*, *Mary Woollaston* and *Ann Rose*, the children of the testator are to be at liberty to make their election as between themselves, Whether they will take by the will of the father, or by the custom of *London* (3).

(1) So *Mosely* v. *Mosely*, 2 *Cha. Rep.* 105. *Powel* v. *Morgan*, 2 *Vern.* 90. *Loyd* v. *Spillet*, 3 *P. W.* 344, *post.* 2 vol. 148. S. C. *Contra* where there is a devise over upon breach of such condition. *Cleaver* v. *Spurling*, 2 *P. W.* 528. *Vide Webb* v. *Webb*, 1 *Cox's P. W.* 136. note 1.

(2) *Pugh* v. *Smith*, *post.* 2 vol. 43.

(3) *Reg. Lib. B.* 1737. *fol.* 506.

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(C) *What is, or is not, an Advancement.*

November the 30th, 1739. At the Rolls.

Fawkner and his Wife v. *Watts*.

Case 182.
S. C. *post.* 406.

THE bill was brought by *John Fawkner* and *Mary* his wife, for an account of the personal estate of *Francis Everett*, a freeman of *London*, the father of *Mary*, and for her orphanage share in such estate. He, by his will, gave to the plaintiff *Mary* the whole of his estate, and afterwards by the codicil changed the disposition intirely, and gave it in fifths to the sons of his daughter by Mr. *Paxton* her former husband, two-fifths to one son, and three-fifths to the other.

Mary

Mary died since the filing of the bill, and the husband, as administrator to her, claims one moiety of *Francis Everett*'s estate, insisting his wife was never so advanced as to be debarred of her customary share. FAWKNER v. WATTS.

Depositions were read on the part of the plaintiff to prove her father a freeman; and it was admitted by the defendant, that *Mary* was the *only* child of this freeman, which circumstance the counsel for the plaintiff insisted made it a very strong case in her favour, and distinguished it from all the other cases; and for this purpose cited *Shepherd* v. *Newland*, (a) before Lord *Macclesfield*, and afterwards re-heard before Lord *King*.

(a) Vide 2 P.W. 194.

Mr. *Brown* counsel for the defendant: It is not disputed, said he, but *Mary*'s marriage with *Paxton* was with her father's consent, and likewise admitted that there was a sum of money then advanced by her father, and that the exact sum does not appear.

The constant rule is, said he, where a daughter of a freeman is married with the father's consent, and is advanced; but it does not appear with how much that she shall be said *to be fully advanced*.

It has indeed been objected by the counsel on the other side, that, as *Mary* was the *only* child, she shall not be said to be fully advanced, so as to give the father a right to dispose of the residue of his estate to the prejudice of such child. But the rule of advancement will hold as well, where there is but one, as where there are many children; for what the custom goes upon is, that the father, by advancing the daughter upon the marriage, which he need not have done till the time of his death, gains an absolute power over his estate, and therefore the circumstance of an only child does not alter the case.

He cited the cases of *Civil* v. *Rich*, 1 *Vern*. 216. *Stanton* v. *Platt*, 2 *Vern*. 753. *Dean* & *Ux*' v. *Lord Delawar*, 2 *Vern*. 628.

Master of the Rolls: As it is in the case of infants, and the defendants have laid some foundation to shew (by suggesting the consent of the freeman to the daughter's first marriage) that *Mary Fawkner* was advanced, let the cause stand over, to give the infants an opportunity of putting in a second answer, and charging advancement. [406]

March the 1st, 1741. At the Rolls.

Fawkner v. *Watts*.

Case 183.

S. C. preceding.

If a child or children of a freeman of *London* are advanced in the father's life-time, they shall be said to be fully advanced, unless the *quantum* of the advancement appears in writing under his hand (1).

THE advancement of *Mary* upon her first marriage, being now fully charged in the answer of the defendants, it stood for judgment in the paper of this day.

(1) 2 *Salk*. 426. S. P. *Civil* v. *Rich*, 1 *Vern*. 216. *Dean* v. *Ld. Delaware*, 2 *Vern*. 630. *Cleaver* v. *Spurling*, 2 *P. W.* 527. *Barnham* v. *Phillips*, cited, *post*. 2 vol. 423. *Hearn* v. *Barber*, *post*. 3 vol. 213. *Hume* v. *Edwards*, *post*. 3 vol. 451. *Elliot* v. *Collier*, 1 *Vej*. 16. 1 *Wilf*. 168. S. C. *post*. 3 vol. 527. S.C. *Har*. *Co. Litt*. 177. b. note 8.

Fawkner v. Watts.

Master of the Rolls: There can be no manner of doubt but the plaintiff, if *Mary* had any right to the orphanage share in the personal estate of her father Mr. *Everett*, is equally intitled (1).

It is insisted on behalf of the defendants, that *Mary*, before her marriage with *Fawkner*, had a former husband *Paxton*; that the first marriage was with the intire approbation of her father, and that he had advanced her at that time, and that the *quantum* of the portion does not appear; and that the rule laid down in all the cases is, that if a daughter marries with a father's consent, and is advanced, but the *quantum* of the advancement is not ascertained by some writing under the father's hand, it must be considered as a full advancement, and will bar the child of its orphanage share.

The first case cited on the part of the defendants was, *Civil* v. *Rich*, 1 *Vern*. 216. "A child advanced in marriage "with a portion, is barred of the orphanage part, unless the "certainty of such portion appears by writing under the fa-"ther's hand."

The next case which is subsequent in point of time, is *Chace* v. *Box*, *Eq. Cases Abr.* 154, 155. *Vide* the custom of *London* certified there.

In the first case, it is said, *by a writing under the hand and seal of the father*; *in the second*, *signed with his name or mark*: But as this is not a circumstance in the present case, I need not take any notice of it.

There is another case in 1729, *Cleaver* v. *Spurling*, 2 *Wms*. 526. "If a freeman has advanced his child on marriage, and "the certainty of that advancement does not appear under the "freeman's hand, this is to be taken as a full advancement."

The result of these cases is, that if a child or children are advanced in the father's life-time, they shall be said to be fully advanced, unless the *quantum* of the advancement appears in writing under the father's hand.

But then the counsel for the plaintiff have endeavoured to make a difference when there is only *one child*, as in the present case, to distinguish it from all other cases; and for this purpose have cited the case of *Shepherd* v. *Newland*, before Lord *Macclesfield*, and re-heard afterwards before Lord *King*.

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This custom will hold equally with regard to an *only* child, as where there are many children.

But notwithstanding the rule as laid down there is certainly true, yet it does not come up to the present case; for I take the custom to be the same with regard to an *only* child, as where there are many children, and that if a father advances such a child, and the *quantum* does not appear in writing, it is a full and compleat advancement.

The next consideration will be upon the evidence, Whether the first marriage was with the father's consent, and whether there was any advancement (2)?

(1) *Elliot* v. *Collier*, 1 *Ves*. 16. *post*. 3 vol. 526. S. C. 1 *Wils*. 168. S. C.

(2) It seems if the marriage be against the father's consent, that alone will bar the orphanage part. *Hume* v. *Edwards*, *post*. 3 vol. 451.

Now

Now from the proofs that have been read, there is no manner of doubt but the father was well satisfied with the match; for it appears he was chearful on the wedding day, dined with his daughter, and her husband after the ceremony was over, and expressed great satisfaction at the match. FAWKNER v. WATTS.

As to the proofs of the father's declarations of sums of money advanced as a portion with *Mary* to Mr. *Paxton*, I do not think they are proper evidence in the present case, for it would be extremely hard, if *parol evidence* of a father's declaration should be allowed to debar a child of her orphanage share.

Parol evidence of a father's declaration will not be allowed to debar a child of her orphanage share; but proofs of declarations by *the husband*, in regard to an advancement in marriage with the daughter of a freeman, will be admitted. Proofs also of declarations of the wife, made during the coverture of her first husband, may be read against the second (1).

But the same rule will not hold as to any declarations of the husband, in regard to an advancement in marriage with the daughter of a freeman, for the poofs of Mr. *Paxton*'s declarations here, are very strong, and must be admitted as evidence; and it was so held in the case of *Dean* v. *Lord Delawar* (a), and there is great reason it should be so, because it is a declaration against his interest, as it cuts him off from the orphanage share, which he is intitled to in the right of his wife. (a) 2 Vern. 628, S. C.

I am likewise of opinion that the declarations of the wife, of which there are several proofs, are evidence to bind the husband, for being made during the coverture with the first husband, I see no reason why it should not bind as much as if the declarations had been made after the death of the first husband, and before her marriage with the other.

There is a circumstance too in this case of the testator's borrowing 100*l.* the very day of his daughter's marriage with Mr. *Paxton*, and putting it into a purse with 200*l.* more, in order to give it to the husband, and the husband went into another room with the father, who had the purse in his hand, and when they came out, he declared he had received part of his wife's portion; this has a good deal of weight, assisted with the rest of the evidence.

There has been no writing attempted to be shewn on the part of the plaintiff, under the hand of the father, to ascertain what the advancement was; but his counsel have insisted, tho' there is no particular writing, yet that it may appear what the advancement was by some of the father's books, and therefore the court ought to order his books to be brought before a Master, to inspect, as was done in the case of *Dean* v. *Lord Delawar*. [408]

If it did appear to me in the present case, what it was that the father had advanced by some book written in his own hand, it might be a ground to direct such an inquiry, whether it was a full advancement, upon being compared with the orphanage share; but as there is no such suggestion at all by the bill, that there is any such book, I should not be justified in directing such an inquiry.

Unless it appears by some book written with a freeman's own hand, what he has advanced to a child, the court will not direct an inquiry, whether it was a full advancement.

(1) *Cleaver* v. *Spurling*, 2 *P. W.* 527.

Upon the whole, I do not think the plaintiff intitled to any orphanage ſhare of the late Mr. *Everett's* perſonal eſtate.

The next queſtion is, with regard to maintenance, whether there ſhall be any allowance for the time *Francis Everett Paxton*, an infant, and the ſon of *Mary* by her firſt huſband, lived with his mother.

Where father or mother are in low circumſtances, the child ought *to be maintained* out of a proviſion left by a collateral relation.

I ſhall not diſpute but every father and mother, by the law of nature, is under an obligation *to maintain* their own children, but yet this may be varied by circumſtances; for ſuppoſe the father or mother ſhould be in a low or mean condition in the world, the court will order, eſpecially in the caſe of a mother, that the child ſhould be maintained out of a proviſion left to it by a collateral relation (1).

But here the maintenance was only for ſix months, which is ſo ſmall, that it will not bear the expence of ſending it to a Maſter; therefore, let this demand for maintenance be ſet againſt the coſts for the demand of the orphanage part, and the bill be diſmiſſed without coſts generally.

(1) See *Butler* v. *Butler*, *poſt.* 3 vol. 60. *Roach* v. *Garvan*, 1 *Veſ.* 160. *Hughes* v. *Hughes*, 1 *Bro. Cha. Rep.* 386. *Andrews* v. *Partington*, 3 *Bro. Cha. Rep.* 60.

CAP. XXXVIII.

Decree.

Michaelmas Term, 1737.

Morgan v. ———

Caſe 184.

An original independent decree may be had in this court, where all the facts are ſtated by the bill, notwithſtanding a former decree for the ſame matter in *Wales*.

A Bill was brought for a legacy in the court of equity in *Brecknock* in *Wales*, before the *Welch* Judges at the aſſize, and the legacy decreed to be paid; the defendant appealed from the decree to the Houſe of Lords, and inſiſted there was an omiſſion in the decree; for notwithſtanding an account was directed to be taken, yet it was not ordered that all juſt allowances ſhould be made in ſuch account to the defendant: upon the appeal, the decree, as to the payment of the legacy, was affirmed, but varied as to the juſt allowances; and the Houſe of Lords ordered their decree to be carried into execution by the court in *Wales*.

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The defendant afterwards fled, to avoid the execution of the decree into *England*; and the bill now brought, ſets forth the will by which the legacy was given, and the proceedings and decree in *Wales*, and the appeal to the Houſe of Lords, and their decree, and that the defendant had, to avoid the decree and payment of the money, fled into *England* out of the reach of the proceſs of the court in *Wales*.

To

To this bill the defendant demurred, and for cause shewed that it appeared the plaintiff had obtained a proper and compleat decree, and that this court always refused to assist the decree of an inferior court. Morgan v. ——.

On the other hand it was said, that an action of debt will lie upon a judgment, in an inferior court, in the court of King's Bench, or court of Common Pleas.

Lord Chancellor was inclined to over-rule the demurrer, and said, that the bill having stated the will, and all the proceedings in *Wales*, &c. for the recovery of the legacy, an original independent decree might be had in this court for the legacy, but would not absolutely determine it now; and therefore reserved the consideration of the demurrer till the hearing of the cause.

CAP. XXXIX.

Deeds and other Writings.

(A) *Deeds and Instruments entered into by Fraud, in what Cases to be relieved against.*

Michaelmas Vacation, 1737.

Nicholls v. *Nicholls*.

Case 185. Though a man is arrested by due process, yet if obliged to execute a conveyance while under arrest, this court will relieve.

THOUGH a man is arrested by due process at law, if a wrong use is made of it against the person under such arrest, by obliging him to execute a conveyance, which was never under consideration before, this court will construe it a duress, and relieve against a conveyance executed under such circumstances (1).

Vide title *Heir and Ancestor*.

Vide title *Voluntary Deed, and it's Effects*.

(1) The statement of and decree in this case (which are too long to be stated here) appear fully to warrant the above conclusion. *Reg. Lib. B.* 1737. fol. 508. So 1 *Roll. Ab.* 687. cites 43 *Ed.* 3. 10. b. *Wilkinson* v. *Stafford*, *Ves.* jun. 43. *Vide etiam anon.* 1 *Lev.* 68. *Knight* v. *Norton*, 3 *Leon.* 239. *Roy* v. *Duke of Beaufort*, *post* 2 vol. 193. 2 *Ves.* 635.

CAP. XL.

Devises.

(A) *Of void Devises by Uncertainty, in the Description of the Person to take.*

(B) *Of Devises of Lands for Payment of Debts.*

(C) *Of Executory Devises of Lands of Inheritance.*

(D) *Where a Devise shall, or shall not, be in Satisfaction of a Thing due.*

(E) *What Words pass an Estate Tail.*

(F) *Of Things Personal, as Goods, Chattels, &c. by what Description, and to whom good.*

(G) *What Words pass a Fee in a Will.*

(A) *Of Void Devises, by Uncertainty in the Description of the Person to take.*

Michaelmas Term, 1737.

Rivers's Case.

Case 186. A Testator by his will gives an equal share of his real estate (which shall be his due, when the said estate shall be sold) to his two sons *James* and *Charles Rivers.*

Lord Chancellor. First question, Whether, as it appears that *James* and *Charles* are illegitimate children of the testator, this is such a description of their persons as will intitle them to take under the will?

Though bastards strictly are not sons, yet, if they have acquired that name by reputation, in common parlance they are; though a person's name be mistaken in a devise, yet if made out by averment to be the person meant, the devise to him is good.

In the case of a devise, any thing that amounts to a *designatio personæ* is sufficient, and tho' in strictness they are not his sons, yet, if they have acquired that name by reputation, in common parlance they are to be considered as such (1).

It has been said, the testator has likewise made a mistake in their names, and therefore they cannot take; but the law is otherwise, for if a man is mistaken in a devise, yet if a person is clearly made out by averment to be the person meant, and there can be no other to whom it may be applied; the devise to him is good (2).

(1) See *Dyer* 323. *a. pl.* 29. *Jenk. Cent.* 239. S. C. With respect to *deeds,* see 3 *Leon.* 48, *pl.* 69. *Gynes* v. *Kemsley.* 1 *Freem.* 293. See *Bayles* v. *The Attorney General, post.* 2 vol. 239.

(2) *Pitcairne* v. *Brase, Finch Rep.* 403.

The

The second question is, What interest in the estate devised *James* and *Charles Rivers* take by this will? The words *an equal share of my real estate*, must mean in equal shares, share and share alike, or it cannot be made sensible; and these words can be no further extended than to the surplus due to the testator from that estate which was to be sold, and will not reach to any other estate.

Rivers's Case.

Minshull v. *Minshull*.

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February the 4th, 1737.

Case 187.

R. L. devises to R. M. eldest son of his nephew R. M. and the *first* heirs males of his body, and the heirs males of his body, and in default of such issue, *to the second son of the said* R. M. and the heirs males of his body, and their issues; remainder over, &c. these words, *the second son of the said* R. M. do not mean the second son of the devisee, but *John* the second son of the testator's nephew *R. M.*

RICHARD *Lester* the testator, uncle of *Randal Minshull*, who had *Randal* his eldest son, *John* his second son, and several other children, devises an house, &c. in *hac verba*, *viz.* "I give and devise the house, &c. to *Randal Minshull*, eldest "son of my nephew *Randal Minshull*, and the first heirs males "of his body lawfully begotten, and the heirs males of his "body, and in default of such issue, I give, &c. *to the second "son of the said* Randal Minshull, and the heirs males of his "body and their issues; remainder over, &c." There is a provision made in the will, "that to whomsoever the estate, "should come, he should pay, on his entry upon the estate, "to each of his brothers and sisters 20*l.* a piece, and to *John*, "and the several children of his nephew, naming them particularly, 20*l.* a piece likewise."

The devise in the present case was of a reversion, which did not take effect, till many years after the testator's death.

Randal, the first devisee, dies without issue; *John* enters and dies, having devised the premisses to the defendant his younger son, in prejudice of the plaintiff his eldest son.

The bill was brought for an account of the rents, &c. and at the hearing at the Rolls, the question was, Whether in the devising words, *To the second son of the said* Randal Minshull, the son of the nephew *Randal Minshull* is meant, or the son of the nephew's eldest son; for supposing the latter, the particular limitations in the will extending only to the issue of *Randal* the devisee, who was dead without issue, the reversion on his death taking effect in possession in *John* as heir at law of the testator, the disposition of *John* by will was good; but supposing the will to mean the son of *Randal* the nephew, that *John* being tenant in tail under the will, and not having done any act to bar the entail, the plaintiff has a good title as being the eldest son of *John*.

The master of the Rolls (*a*) decreed in favour of the plaintiff: on appeal to *Lord Chancellor*, he directed an issue to try the matter of fact, which of the two persons was meant by the testator, and said, it was a matter that lay properly in averment, and was determinable by circumstances, proving the inten-

(*a*) Sir *Joseph Jekyll*.

Mansell v. Mansell.

intention of the testator, one way or other; the will was made in 1658, and the parties not being able of either side to furnish themselves with any evidence, tending to clear up this point; it was agreed between them to bring the matter on, for the opinion of the court, upon the legal construction of the words as they appeared on the face of the will.

[412]

The Attorney General for the plaintiff insisted, that *Randal* the devisee was tenant in tail; the use he made thereof was by inferring from thence, that if the testator had made the devisee tenant in tail, an estate which in it's nature included a limitation to all the issue of the devisee, he could never intend likewise to limit a remainder by purchase to the second son of the devisee, who could otherwise take as issue in tail, nor was it possible else *that* remainder could ever take place in possession, because it could only take effect on the death of the first devisee without issue, which supposes the remainder man then dead.

To prove that the subsequent words of limitation, *viz. the heirs males of his body*, annexed to the preceding limitation to the first heirs males of his body, would not controul the former words, and make such first heirs male take by purchase, who would otherwise take by limitation; he cited the case of *Goodright* v. *Pullen*, *B. R.* 13 *Geo.* 1. (1). *Nicholas Lisle* devised the premisses to his wife for life, remainder to his kinsman *Nicholas Lisle*, for the term of his natural life, and after his decease, to the heirs males of the body of the said *Nicholas* lawfully to be begotten, and his heirs for ever. But in case the said *Nicholas* die without such heir male, then he devises to his kinsman *Edward Lisle* for life, and, after his decease, to the heirs males of his body lawfully begotten, and his heirs for ever; and in default of such heir male, remainder over, *&c.* it was held there, that *Nicholas* the first devisee was tenant in tail.

Mr. *Fazakerly* of the same side, to prove that the words *first heirs males* were proper words of limitations, cited the case of *Dubber* v. *Trollop* (2). Sir *Thomas Trollop* having five sons, devises the manor of *Caswick* to his eldest son *William* for life, and, from and after his decease, *to the first heir male of his body*; it was held in that case by the court of common pleas, that *William* was tenant in tail, and on a writ of error brought, that judgment was affirmed in *B. R. M. T.* 1735.

Mr. *Chute e contra*: Both the cases cited are distinguishable from the present; in that of *Goodright* v. *Pullen* there is no such word as *first*; in that of *Dubber* v. *Trollop*, no subsequent words of limitation annexed to the first.

Lord Chancellor: This case will depend on the words of the will with regard to the person intended by the testator, by the name of *Randal*, and the legal operation of the words made

A court never [illegible]es a devise [illegible] unless it is [illegible]lutely dark, [illegible] they cannot find out the testator's meaning.

(1) 2 *Stra.* 729. S. C. 2 Ld. *Raym.* 1437. S. C. 2 *Eq. Ab.* 315. *pl.* 26. S. C.

(2) Post. 433. S. C. cited. *post.* 3 vol. 292.

use

use of; and a court never construes a devise void, unless it is so absolutely dark, that they cannot find out the testator's meaning. MINSHULL v. MINSHULL.

The provision of the payment of the legacies (by the person to whom the estate should come) to his brothers and sisters, and to *John*, &c. is, as has been insisted on for the plaintiff, a very strong expression of the intent of the party; for as here is a specification of the children, it must mean the brothers and sisters of *Randal Minshull*, the eldest son of *Randal Minshull* the nephew, and could never intend to mean every taker. For [413] supposing the words to mean the second son of the devisee, as there is plainly an estate tail created prior to any interest he can claim (whether the words *first heirs males* are construed words of limitation or purchase), an estate which may continue for a great number of years, in all probability, without any failure of issue, it would be a most absurd thing to charge a person, at so great a distance from the estate, with the payment of money to persons then in being, whom the testator could hardly suppose would be living at the time of the title accruing to such second son. On the other hand there is nothing extraordinary in charging *Randal* the first devisee, or upon a supposition of his death without issue, in the life of *John*, in charging *John* with the payment of those sums, which raises a very strong presumption, that *John* was the person intended to take under the limitation to the second son of *Randal*.

It has been objected against this construction, that *John* will then be devisee of the estate, and intitled to the 20*l*. likewise, which the testator could never intend; but the words must be taken *reddendo singula singulis*, and *John* to have the 20*l*. only in case of the first devisee's right taking effect in possession, and the determination of the preceding estates then in being at the time of making the will. It is much more natural likewise that the testator, when he was making a disposition of his whole estate, having a nephew who had two sons, should settle it successively on both the sons, than stop at the first, without extending the entail, or disposing of the reversion.

Whether the first devisee was tenant for life or in tail, is a question proper to be considered, and the determination of that point will certainly give great light into this matter, and clear the way towards the construction of the will on the other point, in the manner it has been insisted on.

I am of opinion the words of limitation, superadded here to the preceding words of limitation, will certainly not of themselves make *the first* words of purchase, but the subsequent ought to be rejected as redundant and superfluous.

In *Archer*'s case*, an estate was limited to *Robert Archer*, the first taker, expresly for life, to which great regard is always had in determining whether an estate for life, or in tail, passes.

* 1 Co. 66. b.

Subsequent words of limitation affect not the legal operation of the preceding words of limitation, unless the word *heir* is used in the singular number, or an express estate for life limited to the first taker (1).

(1) See *Fearne's Rem.* 283, 284, 285. the 4th edit. See also *Wyld* v. *Lewis*, post. 432.

MINSHULL v. MINSHULL.

2dly, in that case it was to the *next heir male* of *Robert* only, not *heirs* as here; nor will the subsequent words of limitation affect the legal operation of the preceding words in any case of this kind, unless the word *heir* is made use of in the singular number, or there is an express estate for life limited to the first taker. It is true, in *Shelly*'s case,* *Anderson* Ch. Just. puts this case, If there be a limitation to the use of a man for life, and after his decease to the use of his heirs, and of their heirs females of their bodies; in this case, these words (his heirs) are words of purchase and not of limitation, for then the subsequent words (and of their heirs females of their bodies) would be void. That appears to be a case only put by *Anderson*, and no resolution of that kind; but besides there, the subsequent words vary essentially the preceding limitations, and alter the course of succession and enjoyment of the estate.

* 1 Co. 93. b. and 95. c.

[414]

No stress to be laid upon the word *first*, means only that they should take in succession, according to priority of birth and seniority of age.

There are subsequent words of limitation annexed likewise to the devise to the second son, which shews the testator had no intention they should operate in destruction of the former words. No stress at all is to be laid on the word *first*; there are many authorities for that purpose, and the case of *Dubber* v. *Trollop* is a very strong one; there the word *heir* too was used, not *heirs*. The word *first* means only that they should take in succession, according to priority of birth and seniority of age, and is unnecessarily providing for what the law itself does.

Decreed for the plaintiff (1).

(1) Decreed, that the premises were devise in remainder to *John Minshull* the second son of *Randal Minshull* the father, which *John* was father of the now plaintiff. *Reg. Lib. B.* 1737. fol. 144.

October the 28th, 17

Purse v. *Snaplin.* Et e contra.

Case 188.

S. C. 1 Vef. 424. cited S. C. 2 Vef. 563. cited.

Robert Rowland gives to his niece *A. S.* 5000*l.* in the old *S. S.* annuity-stock of the *S. S.* company, and to his nephew *R. P.* 5000*l.* in the old *S. S.* annuity stock of the *S. S.* company. At the time of making his will, and at his death, the testator had only 5000*l.* in old *S. S.* annuity stock. They are to be considered as two distinct legacies, and *A. S.* and *R. P.* are intitled to have them made good out of the testator's assets, and the executor directed to [illegible], out of the personal estate, 5000*l.* old *S.S.* annuities, and transfer one moiety to *A. S.* and [illegible] moiety to his own use, and the 5000*l.* old *S. S.* annuities, which the testator died possessed [illegible] be applied proportionably towards payment of the legacies to *A. S.* and *R. P.* (1).

ROBERT *Rowland*, on the 23d of *February* 1734, made his will in these words: "I *Robert Rowland* do hereby "make my will, dispose of my estate in manner following, "*viz. First*, I give and devise to my nephew *Robert Snaplin*, "and his heirs, my freehold and copyhold estates, (by the se-"veral names and descriptions therein mentioned). *Item*, I "give to my niece *Anne Snaplin* 5000*l.* in the old annuity-"stock of the *South-sea* company." And then after two or three intervening legacies of stocks of different kinds, testator says, "I give to my cousin *Robert Purse* 5000 *l.* in the old an-"nuity-stock of the *South-sea* company; and the rest and re-"sidue of my estate, both real and personal, I give, devise, "and bequeath to my nephew *Robert Snaplin*, his heirs, exe-"cutors and administrators, and made *Robert Purse* exe-"cutor." The

(1) Lord *Hardwicke* determined this [illegible] upon the principle, that notwithstanding *one* of the identical legacies did *actually* exist at the time of making the

The testator, at the time of making his will, and at his death, had only 5000 *l.* in old *South-sea* annuity-stock, which *Anne Snaplin*, now the wife of *Charles Townsend*, claims under the will of *Robert Rowland*; and *Robert Purse* brings his bill for the legacy and account of the estate, insisting to retain the same for his own use, for his legacy of 5000*l.* old *South-sea* annuity-stock: in which case the defendant *Anne* insisted, that the plaintiff should, out of the testator's personal estate, purchase 5000 *l.* in old *South-sea* annuity-stock, and transfer the same to her, and pay her the dividends from the death of the testator. MINSHULL v. MINSHULL.

Robert Snaplin, the residuary legatee, insisted that the testator only designed to give away so much old *South-sea* annuity-stock as he was actually possessed of at the time of making his will, and that no part of the personal estate ought to be applied in the purchase of 5000 *l.* in old *South-sea* annuity-stock. [415]

The Master of the Rolls decreed an account of the personal estate of the testator; and as to the two legacies of 5000 *l.* each in old *South-sea* annuities, reserved the consideration thereof. The Master reported that the personal estate was more than sufficient to pay all legacies.

The causes coming on the 22d of *December* 1738, his Honor was of opinion that there could be but one 5000 *l.* old *South-sea* annuity pass by the will, and that the 5000 *l.* old *South-sea* annuity which the testator had at the time of his death; and the interest since, must be divided between the plaintiffs *Robert Purse* and *Anne Snaplin* (wife of *Townsend*), and that *Purse* should transfer one moiety of the said 5000*l.* *South-sea* annuity, and pay one moiety of the interest to *Charles Townsend* and *Anne* his wife.

Robert Purse and *Anne Snaplin*, because they had not 5000 *l.* old *South-sea* annuity-stock each made good to them, appealed from this part of the decree.

the will, yet as the testator had not so *specifically described* either of them as to *distinguish* them from all other things of the same kind (see post. 417), they were to be considered merely as legacies of *quantity and number*. So *Partridge* v. *Partridge Ca. Temp. Talb.* 226. *Lawson* v. *Stitch*, *post.* 507. *Abney* v. *Miller*, *post.* 2 vol. 599. *Sleech* v. *Thorington*, 2 *Ves.* 562. *Brownsdon* v. *Winter*, *Amb.* 57. *Attorney General* v. *Parkins*, *Amb.* 566. *Peterborough* v. *Mortlock*, 1 *Bro. Cha. Rep.* 565. But in *Jeffreys* v. *Jeffreys*, *post.* 3 vol. 120. the testator having at the time he made his will actually so much stock as would *exactly* answer the *two* legacies which he thereby bequeathed, they were both held to be *specific*. So where a legacy of this kind is particularized by the word *my* (as *my* stock), or by any other expression or description, which indicates the testator's intention of making it *specific* or *individual*, (as money in such a bag, &c.) then it shall be deemed a *specific* legacy. *Ashton* v. *Ashton*, *Ca. Temp. Talb.* 152. 3 *P. W.* 384. S. C. *Lawson* v. *Stitch* *post.* 508. *Heath* v. *Perry*, *post.* 3 vol. 103 *Door* v. *Geary*, 1 *Ves.* 255. *Avelin* v. *Ward*, 1 *Ves.* 424. *Sleech* v. *Thorington*, 2 *Ves.* 563. *Drinkwater* v. *Falconer*, 2 *Ves.* 623. *Stafford* v. *Horton*, 1 *Bro. Cha. Rep.* 482. *Ashburner* v. *Macquire*, 2 *Bro. Cha. Rep.* 108. For further distinctions between *general and specific* legacies, the reader is referred to Mr. *Cox*'s note to *Hinton* v. *Pinke*, 1 *P. W.* 540.

Lord

MINSHULL *v.* MINSHULL.

Lord Chancellor: The general question here is, If the two legacies of 5000 *l.* are to be considered as two gifts of the same individual sum and quantity, or different sums and quantities?

If they are gifts of the same individual sum, the decree is right; if they are different and distinct sums, the reason on which that decree is founded, totally fails.

The first and primary thing to be considered is the intention of the testator; and as to that I can have no doubt, he has, in very plain words, given 5000 *l.* to the one and to the other. I believe it will not be denied that when he wrote the first clause, he designed to give *Anne Snaplin* 5000 *l.* how can it then be, thought that he had not the same intent as to *Robert Purse*, when he wrote the second clause, where he has used the same words?

Mistakes in making wills are never to be supposed, if any construction that is agreeable to reason can be found out.

It was urged that the testator had mistaken what stock he had, and what he had before given; but mistakes in making wills are never to be supposed if any construction that is agreeable to reason can be found out. If a man devises a specifick individual thing which he has not, this is a plain mistake; but such argument is never to be used except through necessity, and where it is not to be avoided: so a testator shall not be charged but from necessity with forgetfulness, and here there are scarce two lines intervening between the two legacies now in question, so that there was no possibility of the testator's forgetting.

The first objection is, that the testator by the second clause intended to dispose of the same 5000 *l.* old *South-sea* annuity-stock, and to make *Anne Snaplin* and *Robert Purse* joint tenants.

But this argument is inconsistent with the former way of accounting for it, either by mistake or forgetfulness, and makes the testator guilty of the greatest absurdity. If that had been

[416] his intent when he wrote the second clause, he might have used very plain and expressive words to shew the change of his intention.

I think therefore his intent was clearly to give 5000 *l.* *South-sea* annuity-stock to *Robert Purse*; and the question now is, If such intent can have its effect?

Every clause in a will shall be construed so as to take effect according to the testator's intent, if it is consistent with the rules of law.

Every clause in a will shall be construed so as to take effect according to the testator's intent, if it is consistent with the rules of law; and a testator's power over his personal estate is exceeding free and clear from many restraints, which the law lays upon real estates.

This brings me to the second objection, which is, that the testator had only 5000 *l.* old *South-sea* annuity-stock, either at the time of making his will, or his death, and the will is relative to what the testator had at those periods of time.

In answer to this it is to be observed, that the testator has not used in either bequest the word *mine*, so as to determine the particular property; and the civil law makes great use of the

Insertion or omission of this word in legacies:* and where the words are general, it may be taken as an injunction to the executors to purchase and make up out of the assets what he had bequeathed, though he had it not in specie at the time of his death, and as an indication how the testator would have his assets disposed of; and these legacies to *Anne Snaplin* and *Robert Purse* may very consistently take effect as directions to the executors to purchase 5000 *l.* old *South-sea* annuity-stock, or so much as was wanting to make up the sum bequeathed. In 2 *Domat*, title *Legacies*, *p.* 159. *sec.* 18. Devise of a thing not *in rerum natura*, during the testator's life, held good. * *Vide Swinburne*'s third part, last edition, 173, 179.

PURSE *v.* SNAPLIN.

These resolutions are grounded on the rule of the civil law, in regard to legacies consisting in quantity and number; and there is a great difference between the testator's describing the quantity in general, and his determining and particularising it by the word *mine*.

If the surplus of the testator's personal estate would not have held out sufficient to make up their legacies, it would have been a very strong objection; but the case is delivered from that difficulty by the Master's report, that it is sufficient, and then in conscience all his legacies ought to be satisfied and paid.

The third objection is, that this legacy to *Robert Purse* is a specifick legacy, and therefore, if not found among the testator's assets, must fail.

To this I answer, that there are two kinds of gifts, which by us are reckoned under the name of specifick legacies. [417]

First, When a particular chattel is specifically described, and distinguished from all other things of the same kind (1):

Where a particular chattel is specifically described, and distinguished from all other things of the same kind, and is not found among the testator's effects, it fails; or if given first to *A.* and then to *B.* they must divide it; or if disposed of in the testator's life-time, it is an ademption of such legacy.

Secondly, Something of a particular species which the executor may satisfy, by delivering something of the same kind, as an horse, &c.

The first kind may be more properly called an individual legacy, and if such so bequeathed is not found among the testator's effects, it fails (2); or if given first to *A.* and then to *B.* they must divide it; or if it is disposed of in the life of the testator, it is an ademption of such legacy.

But this gift is not confined to the particular 5000 *l.* old *South-sea* annuity-stock which the testator had, and therefore does not fall within the first rule, but the second, which is of a more liberal

* *Domat*, 2d *vol.* 159. *sec.* 21. When a testator bequeathes a certain thing, which he specifies as being his own, the legacy will not have its effect, unless that thing be found extant in the succession. For example, if he had said, "I bequeath to such a "one my watch, or my diamond ring," and that there were not found in the succession either diamond ring or watch, the legacy would be null. But if he had said, "I be- "queath a diamond ring, or a watch," the legacy would be due, and would have its effect.

(1) See *Lawson* v. *Stitch*, *post*. 508. (2) *Drinkwater* v. *Falconer*, 2 *Ves.* 624.

Purse v. Snaplin.

liberal nature, it is a legacy confisting in quantity and number, and not confined to the ftrictnefs of the firft rule.*

The latter part of the opinion in *Partridge* v. *Partridge* (1) is an authority directly in point with the prefent cafe; and I think there is no real difference between the cafe of a teftator's having only one 5000 *l.* ftock and devifing two 5000 *l.* ftock, and the cafe of a teftator's having no ftock at all, and devifing 1000 *l.* or any other quantity of ftock.

The fourth objection is, that in the other parts of the will the teftator had given to feveral perfons feveral quantities of feveral ftocks, and in each had given the exact fum he was poffeffed of, and therefore it muft be intended in the prefent cafe he meant to give no more than he really had: but I think *that* objection turns quite the contrary way.

The fifth objection is, that one of thefe two legacies is a fpecifick legacy, and it is abfurd to fay that the fame words fhall make one a fpecifick, and one a general legacy.

But the ground of this objection fails, for neither of thefe is a fpecifick legacy, within the ftrict rules, for the reafon before mentioned. The teftator intended 5000 *l.* *South-fea* ftock, which he was poffeffed of, fhould be applied in fatisfaction of thefe legacies as far as it would go; as if he had given 5000 *l.*

[418] in money to *Anne Snaplin* and *Robert Purfe*, and had only 5000 *l.* that muft have been applied as far as it would go; and the executors, if the affets were fufficient, muft have made up the reft: fo it is in this cafe.

The fixth objection is, that this cafe was like money given in fuch a cheft, and that the ftock was *defcriptio loci*; but here it muft be taken as the defcription of the thing given, for the reafons before mentioned.

The feventh objection is, that there was no reafon why 5000 *l.* *South-fea* annuity-ftock fhould be given to *Robert Purfe*, any more than 5000 *l.* in money, there being no particular truft or ufe created.

But thefe, though true, are no objections. We are not to account for the teftator's reafons, but to follow his intent as near as it can be found out; but if a conjecture may be allowed, it was to preferve an exact equality between the two legatees, as they were equal in degree of relation to the teftator.

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* In the cafe of *Partridge* v. *Partridge*, *November* 1736, "the teftator bequeathed " 1000 *l.* *South-fea* ftock to his wife for life, with a power to difpofe of it among his " children. At the time of making his will he had 1800 *l.* *South-fea* ftock; he after- " wards fold out 1600 *l.* and then repurchafed enough to make up the fum given. " Then came the act of parliament for converting fome part of *South-fea* ftock into " annuities. One queftion was, If the altering the ftock according to the act of parliament " was an ademption *pro tanto*? and adjudged not. The fale by the father was likewife " adjudged no ademption, for the devife of fo much *South-fea* ftock was defcriptive of " the nature and kind of the thing devifed not of the particular ftock which the tefta- " tor had; and if at the time of making his will, or death, the teftator had no ftock, " this would have amounted to a direction to the executors to purchafe fo much, ac- " cording to the terms of the devife."

(1) *Ca. temp. Talb.* 226. S. C.

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The eighth objection is, that if this construction prevails, there will be little or no surplus; but if that should be the case, it is of no weight, for in our law particular legatees are always preferred before the residuary legatees (though it was otherwise in the *Roman* law), the *residuum* being by us considered as the gleanings of the testator's estate: besides, here all his real estate is given expressly to the residuary legatee by name.

PURSE v. SNAPLIN. In our law particular legatees are always preferred before the residuary legatees (though otherwise in the *Roman* law), the *residuum* being considered by us as the gleanings in the testator's estate.

These two legacies therefore are to be considered as two distinct legacies, and *Anne Snaplin* and *Robert Purse* are intitled to have them made good out of the testator's assets. But this is not such a general rule, as that stock always shall be considered as a legacy of quantity and number; and therefore I perfectly agree with the case of *Ashton* v. *Ashton*, where the stock was to be sold and land purchased; the testator *there* intended to give only what he was actually possessed of, and it was of great weight in that resolution, that a trust was declared to sell and dispose of, and it could not be supposed that the testator intended his executor should buy stock, and immediately sell it again, and buy land with the money*.

His Lordship directed that so much of the said order as relates to the 5000 *l.* old *South-sea* annuity-stock, given to *Robert Purse* and *Anne Snaplin*, should be reversed; and declared that they are intitled each of them to 5000 *l.* old *South-sea* annuity-stock to be made good to them out of the testator's personal estate; and that the 5000 *l.* old *South-sea* annuity-stock, which he died possessed of, ought to be proportionably applied towards payment thereof, and *Robert Purse* to transfer one moiety of the stock, and the dividends to *Townsend* and *Anne* his wife; and that *Robert Purse* do, out of the personal estate, purchase 5000 *l.* old *South-sea* annuity-stock, and transfer one moiety to *Townsend* and his wife, and the other moiety to his own use: the Master to compute how much the dividends of 5000 *l.* stock, from a year after the testator's death, would have amounted unto, and *Robert Purse* to pay a moiety thereof to *Townsend*, and retain the other himself (1). [419]

* *Vide* Cases in Equity, during the time of Lord *Talbot*, 15. 3 P. W. 42. 83. S. C.

(1) *Reg. Lib. B.* 1738. fol. 24.

(B) *Of Devises of Lands for Payment of Debts.*

Mary Ridout Widow, and Executrix of *William Ridout*, Plaintiff.
Dowding and others (1), —— —— Defendants.

November the 8th, 1737.

WILLIAM *Ridout* who died seised in fee of the reversion of several estates in *Somersetshire*, conveyed them to two persons and their heirs, to the use of himself for life, and afterward to the use of such person, and for such purposes, as he by will should appoint, and did accordingly devise the said premisses to *Robert* and *Richard Tyte*, and their heirs, in trust Case 189.

(1) *Reg. Lib. B.* 1737. fol. 99.

Ridout v. Dowding.

for the plaintiff for life, and afterwards for a term of 2000 years, in trust, by and with the consent *and direction of the plaintiff*, testified in writing under her hand and seal, in the presence of three witnesses, for raising such sums as should be thought necessary for discharging his debts, with remainders over, and appointed the plaintiff executrix and residuary legatee; and died soon after without issue.

The defendants set up several demands upon the estate of *William Ridout*, and particularly the defendant *Dowding*, who claimed by bond and otherwise.

A. by his will, first gives an estate for life to his wife, and in the latter part creates a trust term for payment of debts to take place from the day of his death.

Lord Chancellor: A testator in the first part of a will gives his wife an estate for life in particular lands, and in the latter part creates a term for years, to take place from the day of his death, in trust for raising sums of money to discharge his debts, in such manner as the wife should direct.

The question is, Whether the wife is intitled to have her estate for life discharged of the term.

The term, tho' subsequent, shall take place of the wife's estate for life, especially as it is a trust term for raising money. It is immaterial how a testator places the several devises in a will, because the whole must be construed together, so as to make it consistent (1).

Notwithstanding the testator has in the outset of his will given her an estate for life, yet I am of opinion the term, tho' subsequent, shall take place of the wife's estate for life, and it is plain it was his intention it should be so, by making use of these words, *the term to take place from the day of his death* (2), and it is immaterial how a testator places the several devises in a will, because the whole must be construed together, so as to make [*420] it consistent, and here it is not subject to a bare and naked term only, which might have admitted of some doubt, but to the trust of a term to raise money for discharging the testator's debts, and the words that follow, *in such manner as his wife should direct*, do not intend the wife shall have a power of exempting her estate for life, but only that she may raise it in the most convenient method, either by mortgage, or otherwise.

His Lordship decreed, If the personal estate of *William Ridout* is not sufficient to pay his debts, that the trustees should sell the term of 2000 years to make good such deficiency.

(1) See *Uvedale* v. *Halfpeny*, 2 *P. W.* 151. *Worseley* v. *Glanville*, 2 *Ves.* 333. *Brown* v. *Jones*, *ante*, 188.

(2) These words do not appear in the Register's book: nor does the decree take any notice of the point here made, but directs the sale of the 2000 years term *generally*, as mentioned in the decree here stated.

May the 3d, 1738.

Blatch and *Agnis*, in behalf of themselves, and all other Creditors of *Francis Elliot* deceased, } Plaintiffs.

Wilder and others, Defendants.

Case 190.

A testator devises all his real and personal estate to be sold for payment of his debts, and appoints the defendant executor; the personal estate not being sufficient, a bill brought by bond and note creditors of the testator, to be paid their demands out of the real estate. The question, Whether the executor can sell the same, as the testator had given it generally to be sold, without directing who should sell.

FRANCIS *Elliot* being indebted to the plaintiffs by bond and note, and to several other persons, and being seised in fee in divers lands, part freehold, and part copyhold, and of a considerable personal estate, having duly surrendered the copyhold, made

made his will, and thereby devised all his real and personal estate, whether freehold or copyhold, to be sold for payment of his debts, and appointed the defendants *Wilder* and *Agnis* executors; *Wilder* alone proved the will, and took upon him the execution thereof, and the personal estate not being sufficient to pay his debts, the plaintiffs bring their bill to be paid their respective demands out of the testator's real estate.

BLATCH *v.* WILDER.

The defendants admit the will, but *Wilder* the executor submits it to the court, whether he can safely proceed to a sale of the estate, in regard the testator had only given it to be sold generally, without directing who should sell the same.

Mr. *Fazakerly* insisted the executor ought to sell, and for this purpose cited, 2 *Jo.* 25. 2 *Leon.* 220.

Lord Chancellor: I am of opinion, that money arising from the sale of lands devised to an executor for that purpose, or which the executor is impowered to sell, are legal assets in his hands, and administrable as such (1), and such money, &c. being assets likewise in the same manner in the present case, it is a very reasonable construction, that the executor should be the person who should make the sale; and therefore I decree that in case the personal estate should not be sufficient to pay the debts and legacies, that then the real estate of the testator, both freehold and copyhold, shall be sold, and likewise that the executors and the heir shall join in the sale, and all other proper parties as the Master shall direct (2).

The money arising from the sale, is legal assets in the hands of the executor.

(1) In *Newton* v. *Bennet*, 1 *Bro. Cha. Rep.* 135. Lord *Thurlow* said, that there must be a mistake in the above case, for it was always held, that an estate devised to an executor to sell was *equitable* assets. Most however of the *old* cases agree with the above statement of Lord *Hardwicke's* decision. *Burwell* v. *Corrant*, *Hard.* 405. *Girling* v. *Lee*, 1 *Vern.* 63. *Hawker* v. *Buckland*, 2 *Vern.* 106. *Greaves* v. *Powell*, 2 *Vern.* 248. *Anon.* 2 *Vern.* 405. *Cutterback* v. *Smith*, *Prec. Cha.* 127. *Bickham* v. *Freeman*, *Pre. Cha* 126. *Deg* v. *Deg*, 2 *P. W.* 416. *Walker* v. *Meager*, 2 *P. W.* 552. But it seems *now* to be settled, that where a power is given to executors to sell lands (whether that power be *naked* or *coupled with an interest*, whether it be reserved to them *and their heirs*, or merely to them *quasi* executors), the lands subject to such power will be considered as affected by a *trust*, the executors as *trustees*, and the monies arising by the sale as *equitable* assets. *Hickson* v. *Witham*, *Finch* 196. *Anon.* 2 *Vern.* 133. *Challis* v. *Casborn*, *Prec. Cha.* 408. *Lewin* v. *Okeley*, *post.* 2 vol. 50. *Newton* v. *Bennet*, 1 *Bro Cha. Rep.* 135. *Silk* v. *Prime*, 1 *Bro. Cha Rep* 138. in note. *Barker* v. *Boucher*, 1 *Bro. Cha. Rep.* 140. in note. *Batson* v. *Lindegreen*, 2 *Bro. Cha. Rep.* 94. Notwithstanding it was held in the cases of *Fremoult* v. *Dedire*, 1 *P. W.* 430. *Plunket* v. *Penson*, *post.* 2 vol. 293, and *Allan* v. *Heber*, 2 *Stra.* 1270, that where lands charged with the payment of debts *descend to* the heir at law, they are *legal* assets, because the *descent* is not *broken*, as it would be in a devise to a *stranger*, yet that doctrine was expressly exploded in *Hargrave* v. *Tindal*, 1 *Bro. Cha. Rep.* 136, in note. And in *Batson* v. *Lindegreen*, 1 *Bro. Cha. Rep.* 94. Lord *Thurlow* said, that a devise to an *heir* to sell would make the produce *equitable* assets; and a *charge* is a *devise pro tanto*. See *Gilpin's* Case, *Cro. Car.* 161. In what cases an equity of redemption shall be *legal* or *equitable* assets; See *Plunket* v. *Penson*, *post.* 2 vol. 290.

(2) *Reg. Lib. A.* 1737. *fol.* 380.

BLATCH *v.* WILDER.

Where lands are devised to trustees to be sold for payment of debts, and the heir is an infant, he has no day to shew cause when he comes of age, but if the lands are not devised to any particular person, it is otherwise.

It was agreed in this case, that where lands are devised to trustees to be sold for payment of debts, and the heir at law is an infant, he has no day given him to shew cause on his coming of age; otherwise where there is no devise of lands expresly to any particular person, for in that case he has; and this being one of these cases, his Lordship directed the infant the customary heir of the copyhold premisses to join in the sale thereof on attaining 21, unless within six months after he shall attain such age, he shall shew cause to the contrary, and the purchaser of the copyhold in the mean time to hold and enjoy the same.

November the 21st, 1739.

Bateman v. *Bateman* and Others.

Case 191.

A proviso in the will of R. B. that if his personal estate and house and lands at *W.* should not pay his debts, then his executors *to raise* the same out of his copyhold premisses.

ROBERT Bateman by his will taking notice that he was seised of a copyhold, and that he had surrendered the same to the use of his will, directs that the said copyhold should remain, one third to his wife for life, and the other two thirds to his son, paying to his two daughters 150*l.* a-piece at 21, but by a latter clause in the will, says, *Provided*, that if my personal estate, and my house and lands at *W.* should not pay my debts, then my executors to raise the same out of my said copyhold premisses.

The rents not being sufficient to discharge the testator's debts, these words will give the trustees a power to sell the copyhold lands to satisfy his intention of paying his debts.

Lord Chancellor: The question is, Whether this latter devise will intitle the executors to sell the copyhold estates, and I am of opinion it will, for as the rents are not near enough to discharge testator's debts, these words will give the trustees a power to sell, to satisfy the testator's intention of paying his debts: therefore let an account be taken of the rents and profits of the copyhold estate, devised by the will of *Robert Bateman* for payment of his debts; and if there is not sufficient to pay his debts, I do decree *that the copyhold estate be sold*, and the money arising by such sale be applied towards satisfaction of what shall be found due (1).

(1) *Reg. Lib. A.* 1739. *fol.* 259. The testator upon his marriage had settled some freehold lands upon his wife and children, and covenanted, that they were free from incumbrances. It happened however, that these lands were subject to a prior mortgage. Decreed that the plaintiffs are intitled to have the *settled* estate exonerated of the mortgage out of the personal estate and *copyhold* estate devised for payment of debts. *Vide Galton* v. *Hancock*, *post.* 2 vol. 424, 427, 430, and notes.

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(C) *Of Executory Devises of Lands of Inheritance.*

Michaelmas Term, 1737.

Hayward v. *Stillingfleet.*

Case 192.

W. H. by will gave 100 *l.* to his daughter *Frances*, and 450 *l.* between two other daughters, and then devises his land in trust for a term of 99 years, with a power to raise a less term upon trust, that if his wife should within a 4 years pay off the 550 *l.* then the lands to go to her for life, and after her death to *W. H.* his son and his heirs male and female, and for want of such issue, to him and his heirs for ever.

This is a conditional limitation in the wife, taking place as an executory devise, and the freehold descended to the son as heir at law to the testator, till the 4 years were elapsed, or his wife had performed the condition, as a part of the inheritance undisposed of, and by this devise the son had a good estate tail in the inheritance, expectant on the determination of the term of 99 years.

WALTER Hayward senior by his will gave the sum of 550 *l.* between his three daughters payable within 4 years after his decease in manner therein mentioned, and then devises his lands, in trust for a term of 99 years, with a power to raise a less term upon this special trust and confidence, that if his wife should within 4 years after his decease pay off, or secure to be paid, the said sum of 550 *l.* to the said trustees, for the benefit of his said daughters, then he gives all his lands to his wife for her life, and after her death to *Walter Hayward* his son, and his heirs male and female, and for want of such issue, to testators own heirs for ever, the said term to wait on the inheritance, and the trustees to convey over as aforesaid, and the fortune of each daughter upon her death before marriage to go to the survivor.

The wife did not pay the money.

And some years ago a bill was brought against *Walter Hayward* the father of the plaintiff, for the 550 *l.* and a decree was made for the sale, and after the payment of this sum, the residue was to be laid out for the benefit of *Walter Hayward* then an infant, and father to the plaintiff. The estate was accordingly sold to Mrs. *Stillingfleet* for 610 *l.* the 550 *l.* first paid off, and the residue applied according to the decree.

The plaintiff's father when he came of age, in consideration of his confirming the purchase to Mrs. *Stillingfleet*, and conveying the remainder of the term, to prevent the merging thereof, to trustees appointed by her, received the 60 *l.* being the residue after the sum of 550 *l.* raised, and paid to the daughters.

Mrs. *Stillingfleet* devises *the estate* to the defendant in fee.

The present bill is brought by the grandson of the testator, and heir at law of the son, for the reversion of the inheritance after the term for 99 years, and for an account of what timber has been cut down, and for an injunction to stay waste for the future, and for the delivery of the deeds and writings, and for an assignment of the said term, against the defendant the devisee of the purchaser of term, and inheritance from the plaintiff's father, the son of the testator, there being no fine levied to the pur-

Hayward v. Stillingfleet.

purchaser by *Walter Hayward* (1), and she having notice, at the time of the purchase, of the estate tail.

Mr. *Brown* for the plaintiff insisted, that this is not such a precedent condition with respect to the estate tail, as must be performed by the tenant in tail, before he can be intitled, but at most a charge only upon the estate.

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That the testator, in consequence of his wife's paying the 550*l.* gave her an estate for life, and if she did not pay it, could never intend that the son should not have the estate upon paying this 550*l.*

A term of 99 years created, with a remainder over, if the tenant for life paid not the 550*l.* is a refusal of this estate, and it shall not go over to the remainder man.

The trustees have a power to raise it by sale or mortgage of all or part of the estate, and after the money was raised, they were to assign over the trust, either at the request of the wife, or the son.

If the wife should not request, then at the request of the son, which shews plainly, that the father had provided for the contingency of the mother's not paying.

The intention of the testator was, that the money should be raised at all events, and to make a compleat settlement of his whole estate.

It is not pretended by the defendant, that there has been a fine levied, or recovery suffered of this estate, but only a covenant by the plaintiff's father, who sold it to levy a fine, and no covenant by tenant in tail can bind the issue in tail (2).

Mr. *Attorney General* for the defendant.

I have often heard it laid down here, that this court will not entertain a bill, where the demand is under 10*l.* and the plaintiff's own witnesses do not pretend to say that the timber cut down amounts to more than 30*s.* in value.

The father of the plaintiff conveyed the estate to a fair and *bonâ fide* purchaser, and therefore the plaintiff who is a mere volunteer, claiming under a person who might have barred him by a fine, shall not overturn a purchase for a valuable consideration.

The whole inheritance of the estate was sold for 660*l.* can it be said then that the wife had any benefit from an estate for life, chargeable with 550*l.* where the whole inheritance is worth but 660*l.* so that it appears plainly to be the intention of the testator, to make a provision for his daughter, without regarding any of the limitations of this estate.

(1) But there was a covenant to levy a fine. *Note.* The conveyance of the reversion was for 275*l.* over and above the 650*l.* the purchase money of the term.

(2) So *Stapleton* v. *Stapleton*, ante 10. *Saville's* Case, 1 *Vef.* 224. 2 *Vef.* 634. 662. But where a tenant in tail made a conveyance, and covenanted *for further assurance*, and then became a bankrupt, such covenant was held to bind the lands in the hands of the assignees. *Edwards* v. *Applebee*, 2 *Bro. Cha. Rep.* 652. in note. See *Sutton* v. *Stone*, *post.* 2 vol. 101. note 3.

He

He then called for the deed in which the plaintiff's father conveyed the estate to Mrs. *Stillingfleet* the purchaser, and read out of it the covenant on the part of the seller, to levy a fine in the term following. HAYWARD v. STILLINGFLEET.

He concluded with saying, that the estate for life to the wife, and all the estates concomitant upon it, depended on a contingency, the payment of the 550*l.* and as that was not paid, the limitations cannot be said to have taken place.

Lord Chancellor: The only question is upon the title, and when that is determined, the decree as to the matters prayed by the bill will follow of course, and it depends upon the limitations in the will of old *Walter Hayward.* [424]

He plainly declares his intention in the beginning, to dispose of his whole estate at all events, after this he gives to his three daughters 550*l.* to be paid out of his lands in *Cranbourn*, and then appoints the manner of raising it, and says, if his wife pay the 550*l.* within four years after his decease, then he gives her an estate for life, out of the inheritance of his land.

If it be a condition, it is insisted it is annexed to the term for 99 years, and that he intended to give his wife an estate in the term, but I think this cannot be so construed contrary to the words, for tho' it is aukwardly expressed, yet he meant to carve an estate for life out of the inheritance of the estate, and not out of the term.

The question is, Whether the words of payment amount to a condition, or a limitation, and whether a condition precedent or subsequent?

Now I think they cannot create a condition subsequent, for the heir at law to whom an estate tail is after given, must be the person to enter and defeat the condition, because an estate of freehold cannot cease without an entry for a breach of the condition, and here has been no entry, and this would destroy the whole intention of the will, which would not at all serve the plaintiff, nor can it be a condition precedent, for as I said before, if there was a breach, no body can take advantage of it but the heir at law, for a devisee cannot, and such a construction would defeat the estate tail (1).

And wherever there is a limitation with remainders over, made in the words of a condition, which would be construed as a condition, if they could effect, it ought to be construed as a limitation, if they cannot.

I am of opinion that this is a conditional limitation in the wife, taking place as an executory devise: for it cannot be a contingent remainder, for that can never depend upon an estate for years, but must have a *freehold* to support it.

And though this is an executory devise to the wife, which never took effect, yet the estate tail to the son is well limited, and took place (2). The

(1) See 1 *Fearne* 406. *et seq.* 4th Edit.

(2) The principle, that a remainder over shall take effect, notwithstanding the

HAYWARD v. STILLINGFLEET.

The case of *Scattergood* and *Edge*. 1 *Salk*. 229. is in point.

This being an executory devise, the freehold descended to the son as heir at law to the testator, till the four years were elapsed, or his wife had performed the condition, as a part of the inheritance undisposed of (1), and where an estate vests by descent, it can never devest again.

It has been insisted upon for the defendant, that this is a very hard case against him who claims under a purchaser for valuable consideration, but if it is a purchase of an estate with notice of the title, it takes off from the hardship.

[425] It has been objected too, that the plaintiff comes too early, but though he cannot enter during the term, yet he may apply to this court to preserve the inheritance.

A surrender of the term would not be proper, because it is not merely in the nature of a security, but an absolute power in the trustees to sell the estate for raising the daughters' portions.

Upon the whole, I think by this devise the son has a good estate tail in the inheritance, expectant on the determination of the term of 99 years.

Therefore his Lordship decreed a perpetual injunction to stay waste, and the deeds and writings that concern the plaintiff's title to the inheritance to be secured for his benefit (2), and gave no costs on either side.

the condition annexed to the preceding estate, and on which the remainder is limited, should never arise, or be performed, is recognized by many cases. *Scattergood* v. *Edge*, 1 *Salk* 229. *Jones* v. *Westcomb*, 1 *Eq.* 245 *Hopkins* v. *Hopkins*, *Ca. temp. Talb.* 44. *Andrews* v. *Fulham*, 2 *Stra.* 1092. 1 *Vef.* 421. S. C. 1 *Wilf.* 107. S. C. 3 *Burr.* 1624. S. C. *Gulliver* v. *Wickett*, 1 *Wilf.* 105. 2 *Stra.* 1093. S. C. 1 *Vef.* 421. S. C. *Wig* v. *Wig*, *ante* 382. *Fonnereau* v. *Fonnereau*, *post.* 3 vol. 315. *Avelyn* v. *Ward*, 1 *Vef.* 420. *Bradford* v. *Foley*, *Doug.* 63. *Statham* v. *Bell*, *Cowp.* 40. *Horton* v. *Whittaker*, 1 *Durn.* & *East* 346. *Vide Doo* v. *Brabant*, 3 *Bro. Cha. Rep.* 393

(1) So *Pay's* Case, *Cro. Eliz.* 878. *Gore* v. *Gore*, 2 *P. W.* 28. *Hopkins* v. *Hopkins*, *Ca. temp. Talb.* 44. *Wig* v. *Wig*, *ante* 382. *Trevanion* v. *Vivian*, 2 *Vef.* 430. *Bullock* v. *Stones*, 2 *Vef.* 521. See *Smith* v. *Newport*, *post.* 2 vol. 344. 476.

(2) Except the assignments of the said term of 99 years. His Lordship also decreed, that the plaintiff was intitled to the inheritance expectant on the said term. *Reg. Lib. A.* 1737. fol. 272.

(D) *Where a Devise shall or shall not be in Satisfaction of a Thing due.*

May the 19th, 1738. Easter Term.

Heather v. *Rider*.

Case 193.

A. gives an annuity of 20*l.* to his daughter, and the heirs of her body quarterly, without any abatement. *B.* the surviving executor of *A.* gives to the daughter of *A.* and her daughter, an annuity of 20*l.* by his will, to be paid quarterly without any abatement out of his freehold houses in *Holborn*, and if they die without issue, then to return to the plaintiff his heir; and by indorsement upon the will with a pencil, says, "I hope this 20*l.* will not be taken for another 20*l.* annuity, but to confirm the 20*l. per ann.* her father left her and her daughter."

EDWARD *Heather*, the grandfather of the plaintiff, being seised in fee of several freehold estates, and likewise possessed of leasehold estates, and also of a considerable personal

 estate,

eſtate, by his will bequeathed an annuity of 20*l.* to his daughter *Anne Hunterford*, and the heirs of her body quarterly, without any abatement; and in caſe ſhe died without iſſue, then to his two ſons *Edward* and *William*, whom he made his executors. *William Heather* died inteſtate, and left iſſue *Edward* the plaintiff, and three other children. *Edward Heather*, the uncle, by his will gave an annuity of 20*l.* to his ſiſter *Anne Hunterford* and her daughter after her, to be paid quarterly, without any abatement, out of his freehold houſes in *Holborn*; but in caſe they die without iſſue, then the ſaid 20*l. per annum*, to return to his nephew the plaintiff, and gave him beſides all his real eſtate which he had from his father.

HEATHER *v.* RIDER.

And by a codicil ſays, "I hope the 20*l.* to my ſiſter *Hunterford* herein will not be taken for another 20*l. a year*, but "to ſettle and confirm the 20*l. per annum*, her father left her "and her daughter; and if they die without iſſue, let it come to "my heir *Edward Heather*."

The codicil was not executed according to the ſtatute of frauds and perjuries, for it was only an indorſement upon the back of the will, and with a pencil.

The queſtion was, Whether theſe are to be conſidered as two diſtinct annuities?

[426]

Lord Chancellor: The teſtator's intention is moſt plain, (if the court can take notice of it) by the indorſement that his ſiſter ſhould have only one annuity, and that he was only willing to confirm and ſettle it on a more ſecure fund than a fluctuating perſonal eſtate, by charging it on his real eſtate, which was not done by the father's will.

The indorſement of no weight, as nothing can either enlarge or diminiſh what affects real eſtate, unleſs it be executed according to the ſtatute of frauds and perjuries.

If it had been inſerted in the will, there could have been no doubt; but as nothing can be taken either to enlarge or diminiſh what affects a real eſtate, unleſs it be executed according to the ſtatute of frauds and perjuries; and as the teſtator has not complied with the directions of that ſtatute, this indorſement cannot be of any weight.

I very much queſtion if this laſt annuity can be taken as a ſatisfaction of the annuity given by the father's will, it being charged on a different fund, and given in another manner; for regard has been always had to the particular circumſtances, limitations, and funds out of which legacies are to ariſe: yet I think ſhe is not intitled to both annuities, but not ſo much on account of the codicil, as by way of exoneration of the perſonal eſtate of the father. He was the only perſon chargeable by way of perſonal demand, and might by codicil or teſtamentary ſchedule, which affects a perſonal eſtate according to the rule in the civil law, direct that in caſe his ſiſter ſhould take the annuity under his will, ſhe ſhould not have it out of his father's perſonal eſtate, but that his perſonal eſtate ſhould be diſcharged therefrom; and taking it in that light, it does not contradict the

In conſtruing one legacy to be a ſatisfaction for another, regard muſt be always had to the particular circumſtances, limitations, and funds, out of which the two ſeveral legacies are to ariſe. The daughter of *A.* not intitled to both annuities.

HEATHER v. RIDER.

the statute of frauds and perjuries, and for that reason his Lordship altered Sir *Joseph Jekyll*'s decree (1).

(1) *Reg. Lib. A.* 1737. fol. 569. This case seems to have been determined upon the same principle as that of *Newman* v. *Newman*, 1 *Bro. Cha. Rep.* 186.

February the 11th, 1737.

Case 194.

Bellasis v. *Uthwatt.*

R. B. on his marriage in 1713, settled exchequer annuities for 99 years, amounting to 300*l.* *per ann.* in trust to himself for life, remainder to his wife for life, remainder to his children in such manner as he should appoint. By the marriage there was only one child, a daughter. In 1720, R. B. devised all his real and personal estate to his wife and her heirs, charged with 10,000*l.* as a portion for his daughter, payable at eighteen. After the death of R. B. his wife makes her will, and gives all her real and personal estate to her daughter and her heirs; *but if she die before she was of age to dispose thereof*, then to trustees to raise 6000*l.* for a charity, the residue thereof, *if her daughter die unmarried*, to the sisters of the testatrix. The daughter, after the mother's death, marries the plaintiff, has issue a daughter, and dies about the age of twenty. The plaintiff, as representative of his wife, and in his own right, brings a bill for an account of the real and personal estate of R. B. and his wife.

IN 1713, on the marriage of *Rupert Billingsley* with *Mary* his wife, he made a settlement of some exchequer annuities for 99 years, to the amount of 300*l.* *per ann.* in trust for himself for life, remainder to his wife for life, remainder to his children, in such manner as he should appoint; and if no children, to his executors, administrators, and assigns. By this marriage there was only one child, *Bridget.*

Rupert was likewise seised of a considerable real and personal estate, and in 1720, devised all his real and personal estate to [427] his wife and her heirs, charged with the payment of 10,000*l.* as a portion for his daughter, payable at the age of 18 years; and in case his wife should marry again, that then the estate should stand charged with a further sum of 5000*l.* for his daughter.

Soon after the death of *Rupert*, *Mary* made her will, and thereby devised all her real and personal estate to her daughter and her heirs, but in case she should die *before she was of age to dispose thereof*, then she gave the same to trustees for raising the sum of 6000*l.* for founding an hospital for seamen's widows at *Dryton*; *the residue thereof*, in case her daughter should die unmarried, to go to the sisters of the testatrix of the whole blood (1).

Mary died soon after she made her will, leaving *Bridget* her daughter, an infant between eleven and twelve years of age. In a few years after her mother's death, *Bridget* marries *William Bellasis*, by whom she had one daughter, and died, being then about the age of twenty.

The plaintiff, as administrator to his wife, and also in his own right, together with his infant daughter, bring a bill against the sisters of the testatrix *Mary*, and against the trustees of the

(1) The words in the Register's book are, "And in case my said daughter shall die *unmarried* my desire is that she should be buried there, and the residue above the said 6000*l.* to be divided among my own sisters." *Reg. Lib. A.* 1737. fol. 323.

charity,

charity, praying an account of the real and personal estate of *Rupert* and *Mary*.

BELLASIS v. UTHWATT.

Lord Chancellor: The first point that has been made in this case is, Whether *Bridget* was intitled to these annuities under the settlement, tho' there was no appointment of them to her by the father, or whether the whole interest therein was not vested in the father, and the daughter not intitled to the same without an appointment in her favour by the father.

The daughter intitled under the settlement to the exchequer annuities, as an interest vested in her, and the father had only a power of disposing thereof among his children as he thought proper, and there being only one child, she is entitled to the whole.

I am of opinion the daughter was intitled under the settlement (which was recited to be made in pursuance of marriage articles) to the exchequer annuities, as an interest vested in her, and that the father had only a power reserved to him of making such disposition thereof among his children as he thought proper, and there being only one child that she was intitled to the whole, and the plaintiff her husband intitled thereto in her right (1).

The 10,000*l.* devised by the will of the father to the daughter, shall not be taken to be in satisfaction of the annuities.

Another point has been made, whether the 10,000*l.* devised by the father to *Bridget*, should be taken to be in satisfaction of these annuities, and so the annuities be considered as part of the father's personal estate, which he had a right to dispose of by his will (2).

I am

(1) So *Witts* v. *Bodington*, 3 *Bro. Cha. Rep.* 95.

(2) The question of satisfaction generally comes before the court upon two occasions; 1st. Where a portion or provision is secured to a child by marriage settlement or otherwise, and the parent or person *in loco parentis* afterwards by will gives the same child a legacy, without expresly directing it to be in satisfaction of the portion; and 2dly, Where a parent or person *in loco parentis* by will bequeaths a legacy to a child or grandchild, and afterwards gives a portion to or makes a provision for that child or grandchild *in his life-time*, without expressing it to be in lieu of the legacy (for it seems, that an express declaration or perhaps *evidence* of the intent will in either case repel the general presumption). *Vide Cuthbert* v. *Peacock*, 2 *Vern.* 593. *Graves* v. *Boyl*, *post.* 509. *Rosewell* v. *Bennet*, *post.* 3 vol. 77. *Debeze* v. *Mann*, 2 *Bro. Cha. Rep.* 165. *Ellison* v. *Cookson*, 2 *Bro. Cha. Rep.* 307. 3 *Bro. Cha. Rep.* 61. S. C. As there are cases expresly upon both these points, they should be considered separately. With respect to the *first*, the general rule is, if the latter provision be as great as, or greater than the former portion or provision, then it is compleat satisfaction; if not so great, then a satisfaction *pro tanto*. But this rule only applies, where the *subsequent* legacy or provision is attended with the same degree of *certainty* as the *former* portion. *Blois* v. *Blois*, 2 *Cha. Rep.* 162. *Jesson* v. *Jesson*, 2 *Vern.* 255. *Thomas* v. *Kemish*, 2 *Vern.* 349. *Bruen* v. *Bruen*, 2 *Vern.* 439. *Hern* v. *Hern*, 2 *Vern.* 555. *Walpole* v. *Conway*, *Barn. Cha. Rep.* 153. *Copley* v. *Copley*, 1 *P. W.* 147. *Warren* v. *Warren*, 1 *Bro. Cha. Rep.* 305. *Ackworth* v. *Ackworth*, 1 *Bro. Cha. Rep.* 307. (note). *Byde* v. *Byde*, 1 *Bro. Cha. Rep.* 309. (note). *Somerset* v. *Somerset*, 1 *Bro. Cha. Rep.* 30?. (note). *Finch* v. *Finch*, 4 *Bro. Cha. Rep.* 38. So this rule (as also the rule, which governs the second *instance* above alluded to) is only applicable to cases, where the latter provision is of the same *nature* (*ejusdem generis*) with the former. *Goodfellow* v. *Burchett*, 2 *Vern.* 298. *Ray* v. *Stanhope*, 2 *Cha. Rep.* 159. *Bellasis* v. *Uthwatt*, infra

Bellasis v. Uthwatt.

Tho' the court leans against double portions, yet regard must be had to circumstances; as where there is an eldest son, or more children and the demand would be to their prejudice, but here it is an only child.

I am of opinion it cannot be taken to be in satisfaction, but that *Bridget* is intitled to both as a double portion; and though there are a great many cases where the court inclines against them, yet regard is always to be had to the circumstances of the case: As for instance, where there is an eldest son or more children, and the demand is made of such double portion to their prejudice; but it is otherwise here, the case of an only child, and the question, whether this shall be implied a satisfaction, when it is not so expressed by the father.

The thing given in satisfaction must be of the same nature, and attended with the same certainty, as that in lieu of which it is given, and land is no satisfaction for money, nor *vice versa*; and tho' they are both of the same nature here, yet the legacy of 10,000*l.* is subject to a contingency of her arriving at 18, and a mere contingency shall not take away a portion absolutely vested, especially in the case of an only child.

In respect to the doctrine of satisfactions, when a bequest is taken to be by way of satisfaction for money before due, the

infra 428. *Saville* v. *Saville*, *post.* 2 vol. 458. *Grave* v. *Earl of Salisbury*, 1 *Bro. Cha. Rep.* 425. *Holmes* v. *Holmes*, 1 *Bro. Cha. Rep.* 555. *Forsight* v. *Grant*, *Ves.* jun. 298. A small variance in the *time of payment* (provided both payments agree as to *certainty*) will not alter the rule; as if the first portion be made payable at 21 years, and the second provision at 18, &c. *Jesson* v. *Jesson*, 2 *Vern.* 255. *Thomas* v. *Kermish*, 2 *Vern.* 349. *Spinks* v. *Robins*, *post* 2 vol. 493. *Clark* v. *Sewel*, *post.* 3 vol. 98. *Warren* v. *Warren*, 1 *Bro. Cha. Rep.* 310. But this last observation strictly applies to satisfaction of *portions*, and not to satisfaction of *debts*. *Nicholls* v. *Judson*, *post.* 2 vol. 300, *Clark* v. *Sewell*, *post.* 3 vol. 96. 98. *Richardson* v. *Greese*, *post.* 3 vol. 65. *Haynes* v. *Mico*, 1 *Bro. Cha. Rep.* 129. *Devese* v. *Pontet*, *Prec. Cha.* 240. (note.) So a *contingent* legacy or provision cannot satisfy an *absolute* portion; or *vice versa*. *Duffield* v. *Smith*, 2 *Vern.* 258. *Bellasis* v. *Uthwatt*, *supra* 426. *Jeacock* v. *Falkner*, 1 *Bro. Cha. Rep.* 295. *Hanbury* v. *Hanbury*, 2 *Bro. Cha. Rep.* 352. 529. *Quære* whether the bequest of a *residue* is within the rule. *Rickman* v. *Morgan*, 1 *Bro. Cha. Rep.* 63. 2 *Bro. Cha. Rep.* 394. S. C. *Baret* v. *Beckford*, 1 *Ves.* 519. *Alleyn* v. *Alleyn*, 2 *Ves.* 37. *Devese* v. *Pontet*, *Prec. Cha.* 240, (note.)

In regard to the second point the rule seems to be, that where a legacy is given to a child, who afterwards upon marriage or otherwise receives from the testator *in his life-time* the like or a greater sum, that sum shall be deemed a satisfaction of the legacy. *Hod* v. *Hurst*, 2 *Freem.* 224. *Hale* v. *Acton*, 2 *Cha. Rep.* 35. *Hoskins* v. *Hoskins*, *Prec. Cha.* 263. *Hartop* v. *Whitmore*, *Prec. Cha.* 541. 1 *P. W.* 681. S. C. *Jenkins* v. *Powell*, 2 *Vern.* 115. *Scotton* v. *Scotton*, 1 *Stra.* 235. *Biggleston* v. *Grubb*, *post.* 2 vol. 48. *Farnham* v. *Phillips*, *post.* 2 vol. 215. *Tapper* v. *Charlcroft*, *post.* 2 vol. 492. If the money so advanced be not *equal* to the legacy, then it appears, that it will be a satisfaction *pro tanto*. *Hoskins* v. *Hoskins*, *Prec. Cha.* 263. *Shudal* v. *Jekyl*, *post.* 2 vol. 518. The rule only extends to portions or monies *actually* paid, or secured to be paid *at all events*; and not to those secured to be paid upon a *contingency*. *Chapman* v. *Salt*, 2 *Vern.* 646. *Hale* v. *Acton*, 2 *Cha. Rep.* 35. *Spinks* v. *Robins*, *post.* 2 vol. 491. *Clark* v. *Sewell*, *post* 3 vol. 99. Neither does it extend to a portion given expresly in satisfaction of a *different claim*; or to a portion given *absolutely*, when the legacy is *under certain limitations*. *Roome* v. *Roome*, *post* 3 vol. 183. *Baugh* v. *Reed*, 3 *Bro. Cha. Rep.* 192. So it is applicable to the cases of *parents*, or a *person in loco parentis*, but not to *strangers*. *Spinks* v. *Robins*, *post.* 2 vol. 492. *Shudal* v. *Jekyl*, *post.* 2 vol. 518. *Powel* v. *Cleaver*, 2 *Bro. Cha. Rep* 500. Where the devise is of a *residue* the rule is inapplicable according to *Farnham* v. *Philips*, *post.* 2 vol. 215.

As to satisfaction of *debts*, see *Nicholson* v. *Judson*, *post.* 2 vol. 300.

thing

thing given in satisfaction must be of the same nature, and attended with the same certainty, as the thing in lieu of which it is given, and land is not to be taken in satisfaction for money, nor money for land. It is true, here they are both of the same nature, both personal estates; but the legacy of 10,000*l.* is subject to a contingency, and not payable unless *Bridget* survived the age of eighteen years, and besides she might have lived till the annuities were run out, as several of the years were already gone; and as the 10,000*l.* legacy might never have become payable, it will be hard to say that a mere contingency shall take away a portion absolutely vested, especially in the case of an only child. If indeed the father had disposed of these annuities to any other person, it might have been a question whether the 10,000*l.* should not be taken to be in satisfaction, and whether upon those circumstances *Bridget* ought to be allowed to insist on both demands?

BELLASIS *v.* UTHWATT.

Another question is made, whether the husband is intitled in the right of his wife to all the personal estate devised to her by *Mary* her mother, *in case she should die before she is of age to dispose thereof?* As at the age of 14 she might have disposed of the personal estate, as the law now stands, it must be the intention of the testatrix that she should at that age have it absolutely; and as she made no disposition, it is proper it should go to the husband, as the representative of his wife, especially as she lived to be 20. The word *thereof* must be construed *reddendo singula singulis*, as it is applied to the personal or real estate; and with regard to the latter devised by the mother's will, the husband's claim of tenancy, by the curtesy therein, is not to be supported, in regard *Bridget* died before she was in a capacity of disposing of the real estate, and the contingency therefore happening on which the 6000*l.* was given to the charity, that must take place.

As a person at the age of 14 may dispose of personal estate, as the law now stands, the daughter was intitled at that age to all the personal estate devised to her by her mother; and as she made no disposition, it will go to the husband. The word *thereof* must be construed *reddendo singula singulis*, as applied to personal or real estate.

But then it has been said a question might be made as to the surplus of the real estate; after the charity provided for; *the words are, The residue thereof, in case her daughters should die unmarried, to go to the testatrix's sisters, &c.* And I think that might go to *Bridget*, and so to the plaintiff her husband, as tenant by the curtesy; because the words may be taken, that if *Bridget* die unmarried, then the residue to go to the sisters: but as the contingency never happened, and as in doubtful cases the heir is always to be preferred, *Bridget* is intitled as heir at law to her mother.

The residue of the mother's real estate, after the charity, shall go to the daughter, and so to the husband, as tenant by the curtesy, as the contingency on which it is given over has never happened, and in doubtful cases the heir is always to be preferred.

His Lordship declared that the plaintiff, as administrator of his late wife, was intitled to the residue of the personal estate of her mother, and to an account of the personal estate of *Rupert Billingsley* her father; and if the personal estate be not sufficient to pay the 10,000*l.* it shall be considered as a charge upon his real estate. He directed the long annuities to be assigned to the plaintiff, as administrator of his wife; and as to the real [429]

Bellasis v. Uthwatt.

real estate devised by *Rupert Billingsley* to *Mary* his wife, and afterwards devised by the will of *Mary*, declared the same liable to answer the 6000 *l.* given to charitable uses, and subject thereto, the plaintiff is intitled to it for his life as tenant by the curtesy, and his daughter, after his death, intitled to the real estate in fee (1).

Vide title *Dower* and *Jointure*.

(1) *Reg. Lib. A.* 1737. fol. 325.

(E) *What Words pass an Estate Tail.*

May the 2d, 1738. Easter Term.

Jonathan Ivie, an Infant, by *George Rooke*, his next Friend, — — } Plaintiffs.

John Ivie, *Belfield*, *Strange*, *Buck* and *George Ivie*, — — } Defendants.

Case 195.

JONATHAN Ivie, the plaintiff's grandfather, by will, dated the 7th of *March*, 1717, devised to his eldest son *Jonathan Ivie* his manor of *Bearford*, with the advowson thereto belonging for life, remainder to his sons in tail male, remainder to the testator's son *John Ivie* for life, without impeachment of waste, remainder to his sons in tail male, *remainder to the plaintiff's father* George Ivie *for life, remainder to his sons in tail male*, remainder over; and also gave to defendants *Strange*, *Buck*, and *Belfield*, two long annuities of one hundred pounds each, *in trust* as to one for the plaintiff's father for life, and then to the plaintiff for life, remainder to the issue male of his body, with divers remainders over. And as to the other, *in trust* for his son *Robert* for life; and in default of issue male, remainder to the said *John Ivie* for life, remainder to his issue male in tail male, remainder to the said *George Ivie* for life, remainder to the plaintiff for life, remainder to the plaintiff's issue male, with divers remainders over; and appointed *John Ivie* his executor, who possessed the personal estate, together

A. by his will devises to his eldest son *Jonathan* a real estate for life, remainder to his sons in tail male, remainder to testator's second son *John* for life, remainder to his sons in tail male, remainder to plaintiff's father *George Ivie* for life, remainder to his sons in tail male, remainder over. And also gave to three trustees two long annuities of 100 *l.* each, in trust as to one for the plaintiff's father for life, and then to the plaintiff for life, remainder to the issue male of his body, remainder over; and to the other, in trust for testator's son *Robert* for life, and in default of issue male, remainder to *John Ivie* for life, remainder to his issue male in tail male, remainder to *George* for life, remainder to the plaintiff for life, with divers remainders over, and appointed *John* his executor, who possessed himself of the title deeds of the real estate, and tallies belonging to the annuities.

Jonathan Ivie is dead without issue, *Robert* likewise without issue male, and the son *John Ivie*, born after testator's death, is since dead, and his father has administered.

In 1720, *John* joined with *George* in sale of the annuity devised to *George* for 3250 *l.* and the purchase money was paid to *George*.

The plaintiff, the son of *George*, brings his bill to have the deeds and writings relating to the real estate deposited in court; and as to the annuity devised to *John* and to the plaintiff in remainder to have security given for the payment of it, when his interest therein should take effect in possession.

And as to the other annuity, to have a satisfaction against *John*, for the breach of trust, in concurring in the sale thereof to the plaintiff's prejudice, and for an equivalent upon the death of his father *George Ivie*.

with

with the title deeds to the real, and the tallies and orders belonging to the annuities; and in 1720, without the consent of the trustees, subscribed them all into the stock of the *South-sea* company.

Ivie v. Ivie.

Robert Ivie, after the death of the testator, died without issue male; *Jonathan Ivie*, the testator's eldest son, died several years since without issue, and *John Ivie* had a son, who died since the testator, and the father has administered to him, and is now without any children. In the year 1720, the trustees declining to accept the trust, *John* joins with his brother *George*, in the absolute sale of the annuity devised to *George*, for 3250*l.* and all the purchase-money is accordingly paid to *George*.

The plaintiff insists, that by the death of *Robert*, without issue male, he is intitled to have the lands settled according to the will, and the produce of the long annuities; and therefore the bill is brought for an execution of the trusts in the will of *Jonathan Ivie* his grandfather, and that the deeds and writings relating to the real estate may be deposited in court, for the mutual benefit of all parties intitled thereto, and against his father and his uncle *John*. As to the annuity devised to *John* and to plaintiff in remainder, to have security given for the payment of this annuity to him, when his interest therein should take effect in possession; and as to the other annuity, to have a satisfaction against *John* for the breach of trust in concurring in this sale to the prejudice of the plaintiff, and that an equivalent might be provided for him to have the benefit of, upon the death of his father, when the annuity would have come to him, if no such sale had been made thereof.

Lord Chancellor was clearly of opinion, that as to the annuity devised to *Robert*, and afterwards to *John* for life, *&c.* that there being words of limitation annexed, such as would create an estate tail in the case of a real estate, upon the birth of the son of *John*, the whole interest in remainder, after the death of *John*, vested in such son, and that the defendant *John Ivie* is absolutely intitled to that annuity as administrator to his son, and therefore, as to this demand, he ordered the bill should stand dismissed (1).

Lord Chancellor of opinion, as the annuity devised to *Robert*, and afterwards to *John* for life, *&c.* that there being words of limitation annexed, such as would create an estate tail in the case of a real estate upon the birth of the son of *John*, the whole interest in remainder vested in such son; and that *John*, as administrator to his son, is absolutely intitled to it; and as to this demand, dismissed the bill.

Where a trustee has been corruptly guilty of a breach of trust, the court will compel such trustee to make satisfaction to the utmost; but as to the annuity sold by *John*, as it was at the instance of *George*, and the money received by *George*, he would not charge *John* with the price the annuity was sold at, but decreed that *George* and *John*, or one of them, do, at their own charge, purchase an exchequer annuity of 100*l.* a year for 99 years, and assign the same to trustees, to be approved of by the Master, and the trusts thereof declared according to the limitations in the will.

(1) *Seale* v. *Seale*, 1 *P. W.* 290. *Dod* v. *Dickenson*, 8 *Vin.* 451. *pl.* 25. *Butterfield* v. *Butterfield*, 1 *Vef.* 133. 154. *Daw* v. *Pit*, *Fearne* 347. *Saltern* v. *Saltern*, *post.* 2 vol. 376. *Stratton* v. *Payne*, 3 *Bro. Par. Ca.* 257. *Earl of Chatham* v. *Tothill*, 6 *Bro. Par. Ca.* 450. See *Hodgson* v. *Bussey*, *post.* 2 vol. 89.

Ivie v. Ivie.

As to the other demand, he said, when a trustee had, in a corrupt or unfair manner, been guilty of a breach of trust the court will sometimes compel such trustee to make a satisfaction to the utmost; yet, as *John* was induced in this case to come into a sale of this annuity, at the pressing instance and request of his brother, in order to raise money, and the money was in fact received by *George*, he would not charge [431] the defendant *John* with the price of the annuity, as it then sold, but decreed that *George Ivie* and *John Ivie*, or one of them, do, at their or one of their own charges, purchase an exchequer annuity of 100*l.* a year for 99 years, of the like nature and value of the exchequer annuity which was sold, and assign the same to trustees to be approved of by the Master, and that the trusts thereof be declared according to the limitations in the will; and further declared, that it appearing by proofs in the cause, the said annuity was so sold at the request of the defendant *George Ivie*, the tenant for life thereof, and that the purchase money came to his own use, the defendant *John Ivie* ought to be indemnified by *George* from the expence he may be put to by being obliged to purchase such annuity, and that in case *John* shall purchase such annuity and assign the same to such trustees, or shall be at any expence in the purchase thereof, he shall be at liberty to prosecute this decree against *George Ivie* in the plaintiff's name, to compel *George* to purchase such annuity, and assign the same as aforesaid, in order to oblige *George* to reimburse *John* the principal money, which shall have been so laid out by him, in and about the purchase of such exchequer annuity, and the interest thereof, and all such expences as he shall have been put to as aforesaid; and that till *George* shall have so done, such growing payments of the annuity which shall be so purchased by *John*, as shall accrue during the life of *George Ivie*, be paid to *John* towards such indemnity, and directed the defendants *George* and *John* to pay the plaintiff his costs as to this part of the cause.

His Lordship refused to direct the *deeds and writings* to be deposited in court, because the plaintiff's interest in the real estate was too remote to warrant it, and is never done but in the case of a remainder-man whose interest is expectant on a mere tenancy for life (1).

As to that part of the plaintiff's bill which prayed the deeds and writings of the real estate, which were in the hands of *John* the tenant for life, might, for the better security of the plaintiff, in whom the inheritance was lodged, be taken out of his hands and deposited in court, his Lordship agreed this to be the common practice in the case of a remainder-man, whose interest was expectant on a mere tenancy for life; but as there was a contingent limitation here to all the sons of *John*, and after that an estate for life in *George* the plaintiff's father, he thought the plaintiff's interest too remote to warrant such a proceeding, and that, as such limitations are extremely frequent, if such a practice should be suffered to prevail, the title-deeds of half the estates in the kingdom might be brought into court; besides, in the present case, the first tenant

(1) Vide *Lord Lempster* v. *Lord Pom*f, *Amb.* 154. *Southby* v. *Stonehouse*, 2 *Ves.* 612. *Ford* v. *Peering*, *Ves.* junior, 72. 77. *Smith* v. *Cooke*, *post.* 3 vol. 382.

for

for life is not the heir at law, but takes by the will as well as the remainder-man, so that there is no danger of destroying the deeds, as there might be in case he was heir, in order to better his estate, and as there is no precedent for any thing of this kind, he declared he would not make one; and therefore, as to so much of the plaintiff's bill as seeks to have the title deeds deposited in this court, his Lordship ordered the bill to stand dismissed (1). Ivie v. Ivie.

(1) *Reg. Lib. A.* 1737. *fol.* 794.

Easter Term, 1738 [432]

Wyld v. *Lewis*.

RICHARD *Wyld*, by his will, "devised to his wife "*Elizabeth*, now the wife of the defendant, all his lands, "*&c.* not settled in jointure generally," and then follow these words, "If it shall happen that my said wife *Elizabeth shall have* "*no son nor daughter* by me begotten on the body of the said "*Elizabeth and for want of such issue*, then the said premisses to "return to my brother *John Wyld*, if he shall be then living, "and his heirs for ever, only paying to his two brothers (*A.* and "*B.*) the sum of 150*l.* within one year after the decease of the "said *Elizabeth*."

Case 196: S. C. post. 3 vol. 785. cited. *R. W.* by his will devised to his wife *Elizabeth*, all his lands, *&c.* not settled in jointure, and then says, if it shall happen that she shall have *no son nor daughter* by me, for want of such issue, the said premisses to return to my brother (the plaintiff) if he shall be then living, and his heirs for ever, paying to *A.* and *B.* 150 *l.* within a year after *Elizabeth*'s death.

Decreed to be an estate tail in *Elizabeth*, because where preceding words are proper to create an estate tail, the legal operation of them cannot be controuled by subsequent provisions (1).

Elizabeth had a daughter born after the death of the testator, and since dead. The bill was now brought by *John Wyld*, the brother of the testator, and who is likewise his heir at law, to restrain the defendants from committing waste; and the question was, What estate *Elizabeth* took by the will, whether in tail, or for life only?

Mr. *Brown* for the plaintiff insisted she took for life only, that the words in the will (*if she has no son or daughter*) would certainly not raise an estate tail by implication, and the subsequent words (*for want of such issue*) will not enlarge the estate, the word (*such*) restraining the word (*issue*) to mean only *such son or daughter*; that the word *issue* received such a restrained construction for the same reason, in the case of *Popham* v. *Banfield*, *Salk.* 236. *for there the devise was to* A. *for life*, *remainder to the first son of* A. *in tail male*, *and so on to the tenth son*, *and if* A. *die with-*

(1) See *Sonday's* case, 9 *Co.* 127. *b.* *Banfield* v. *Popham*, 1 *P. W.* 56. *Blackborn* v. *Edgley*, 1 *P. W.* 605. *Evans* v. *Astley*, 3 *Burr.* 1570. See also *Robinson* v. *Robinson*, *post.* 3 vol. 736.

WYLD v. LEWIS. *out issue male, remainder over; it was insisted A. had an estate tail, but the court held otherwise, and construed the words, dying without issue male, d dying without such issue male.*

That it was the intent of the testator, that *Elizabeth* should take for life only, appears farther from the limitation in the will to *John, if he should be then living*; so likewise from the direction for paying the money within a year, and to the two brothers, particularly naming them, which provisions seem to imply plainly an intention in the testator, that the estate of *John* should commence, if at all, on the death of *Elizabeth*, and was not intended to wait till an estate tail should be spent. That the limitation here to *John* was merely contingent, and such contingency never happening, because *Elizabeth* had a daughter, the plaintiff *John* does not claim under this devise,
[433] but as heir at law to the testator, is intitled to the reversion in fee expectant on the estate for life, limited to the wife under the will.

Mr. *Fazakerley e contra.* To prove this an estate tail, cited *Newton* v. *Barnardine*, *Moore* 127. and *Byfield*'s case, *Hil.* 42 & 43 *Eliz.* cited by *Hale* Chief Justice, in *King* v. *Melling*, 1 *Ventr.* 231. *there the devise was to A. and if he dies, not having a son, then to remain to the heirs of the testator. Son was there taken to be used as* nomen collectivum, *and held an entail.* He likewise cited 2 *Vern.* 766. *Pinbury* v. *Elkin*, it is said there, *if he die, not having a son*, that these words create an estate tail. To inforce this construction, Mr. *Fazakerley* insisted on the absurdity which would otherwise follow, that supposing *Elizabeth* not tenant in tail, but for life only, with a contingent limitation to any son or daughter of her's, if such son or daughter should die in the life of the mother, though leaving issue, such issue could never take within the words of the will, which can never be presumed to be the intent of the testator.

Mr. *Wilbraham* on the same side, said in the case of *Popham* v. *Bamfield*, the foundation the court went on in construing that an estate for life only was the express devise for life to the first devisee, for the words are, "there is a mighty difference be-" "tween a devise to *A.* and if he die without issue, to *B.* and" "a devise to *A.* for life, and if he die without issue then" "to *B.*"

Mr. *Brown* in reply said, if the testator by his will had made a certain and absolute disposition of the whole fee, the objection that the grandchildren would by this construction be excluded, would be strong against us, but here a contingent disposition only, is made of the inheritance to *John*, which contingency has not taken effect, and the estate descends as was intended by the testator, if such contingency should not happen, so that no exclusion of the grandchildren could possibly be.

Lord Chancellor: It seems clear from the words of the will (as to all my worldly estate) which introduce the disposing part of the will, that the testator intended to make an absolute disposition of his whole estate by his will, and not suffer any part to descend as undisposed of, in case of any contingency; and

as he intended a disposition of the whole by his will, the objection that the grandchildren by this construction are liable to be excluded, is a very strong argument for construing this an estate tail, and the inclination to avoid this absurdity has been the principal reason for construing words of the singular number, and which are properly descriptive of particular persons only, in a collective sense, as including the descendants of the first taker, and was the governing reason, in the cases of *Dubber* v. *Trollop* (1), *in B. R.* and *Shaw* and *Weigh* (2), 28th of *April* 1729, *in Dom. Proc. Eq. Cas. Abr.* 185. The case cited in *Ventris* is full as strong as the present; here is no difference in the construction of the devise of a real estate, between a provision, that if devisee dies, not having a son, as it is there, or if the devisee has not a son as *here*. Wyld v. Lewis.

In *Popham* v. *Bamfield*, an express estate for life is limited to the devisee, which has always had a great influence in the construction of a will, when the question has been, Whether tenant for life, or in tail? [434]

If *Elizabeth* has no son nor daughter, must be understood having no issue, and the words for want of such issue, amount to the same, as if he had said for want of such issue generally.

Great stress has been laid by the plaintiff's counsel upon the word *such*, as if it restrained the word *issue* to mean only *such* son or daughter, and that the precedent words, if *Elizabeth* has no son nor daughter, will not raise an estate tail by implication; but in *Wild*'s case, 6 *Co.* 16. *b.* it was resolved, "that if *A.* deviseth his lands to *B.* and his children or issue, "and he hath not any issue at the time of the devise, that the "same is an estate tail, for the intent of the devisor is manifest "and certain, that his children or issues should take, and as "immediate devisees they cannot take, because they are not "*in rerum natura* and by way of remainder they cannot take, "for that was not his intent, for the gift is immediate; there-"fore, there such words shall be taken as words of limitation, "*viz.* as much as children or issues of his body, for every child "or issue ought to be of the body." And I am of opinion here, the words *son or daughter* must be taken in the same sense, as having no issue, and then the word *such* will have no weight, but will amount to the same thing, as if he had said, for want of issue, and the words, having no issue, or dying without issue, have been always considered in the same light, both in law and equity.

The direction for the payment of the 150*l.* within a year, are very proper circumstances in general to be made use of, to induce the construction contended for by the plaintiffs, and what may seem to imply an intent in the testator, that the interest of *John Wyld* under the will should, if at all, commence on the death of *Elizabeth*, but if the preceding words are proper to create an estate tail, the legal operation of them cannot be controuled by those subsequent provisions. The bill must therefore be dismissed.

(1) *Ante* 412. S. C. cited.

(2) 2 *Stra.* 798. S. C. *Fortesc. Rep.* 58.

(F) *Of Things personal, as Goods and Chattels,* &c. *by what Description and to whom good.*

Febr. the 27th, 1758.

The Attorney General v. *Pyle.*

Case 197.

A. devises a freehold messuage at *Rumford,* to the charity school there, and directs the rents and profits to be applied for the benefit of the school, *so long as it shall be endowed with charity.*

And by the same will reciting a debt of 1000 *l.* to be owing to him, gives the said sum to the Coopers Company to build alms-houses.

The debt devised by the will, instead of 1000 *l.* amounted to 365 *l.* 16 *s.* 7 *d.* only.

The freehold estate being devised to a charity, so long as it continues to be endowed with charity, is only given *quousque,* and when it ceases as a gift of real estate, it shall revert for the benefit of the heir of testator.

Though the debt devised by the will amounts only to 365 *l.* 16 *s.* 7 *d.* yet the wrong description, and falling short, will not defeat the legacy.

" *A.* Devises a freehold messuage at *Rumford* to the charity " school there, and directs the rents and profits shall be " applied for the benefit of the said school, *so long as it shall con-* " *tinue to be endowed with charity,*" and afterwards he devises in these words, " Whereas there is now owing to me from *John Stevenson* and company, now residing at *Oporto,* the sum of 1000 *l.* I do hereby give the said sum to the wor- " shipful company of the Coopers, to build alms-houses at " *Rumford.*"

The testator also appointed the interest of the 1000 *l.* to be paid yearly, in several proportions, and for several purposes. At the time of the testator's death, the balance of the account from *Stephenson* and company amounted only to 365 *l.* 16 *s.* 7 *d.* The information was brought at the relation of the Coopers company, to have the directions of the court with regard to these devises, and for the establishment of the charity.

Lord Chancellor: Where a sum of money is given to a charity, so long as it shall continue to be endowed with charity, it is only given *quousque,* and when it ceases, if it is a gift of real estate, it shall fall into the inheritance for the benefit of the heir, if personal, into the *residuum.*

Where a person gives a debt by his will to a corporation, they may recover it in the ecclesiastical court.

Where a person gives a debt of 1000 *l.* which was due to him, to a corporation, it vests in them in law, and they might have recovered it in the ecclesiastical court. The only question that remains then, is, as to the trust of this legacy; the general intention of the testator was, to give a charity to the town of *Rumford,* and the Coopers' company; but if the trust cannot be satisfied in the very terms intended by the testator, yet a wrong description and falling short will not defeat the legacy (1); for there are many cases where a trust for charity cannot take place according to the strict intent of the testator, and still the charity shall not intirely fail, but the court will direct the appli-
[436] cation of it as far as they can, to carry the intent of the testator into execution, or at least nearest to the intent; and I will in this case endeavour to apply the legacies in such a manner as

(1) See *Ashton* v. *Ashton,* 3 *P. W.* 384, and *Door* v. *Geary,* 1 *Ves.* 255.

will

will be most agreeable to the testator's design, *and do therefore declare, that the rents and profits of the freehold messuage at* Rumford *ought to be applied to the benefit of the charity school at* Rumford, *so long as the said charity school shall continue to be endowed with charity, and decree the defendant* Lewis, *the heir at law of the testator, to convey the said messuage to the other defendants, the trustees of the charity.*

The Attorney General *v.* Pyle.

And let the sum of 365 l. 16s. 7d. *be placed out at interest, and let the interest arising therefrom be from time to time distributed among the alms people belonging to the alms-houses of the Coopers' company, for the increase of their allowance, over and above what is now allowed them by the donor of the said alms-houses.*

(G) *What Words pass a Fee in a Will.*

Sarah Cheeseman, Widow, —— —— Exceptant.
Francis Partridge, Clerk, —— —— Respondent.

December the 6th, 1739.

Case 198.

T. C. by will gives *to the Latin school* of Yeovil, five pounds, to be paid yearly for teaching and instructing 3 boys.

As it is not a gift to a particular schoolmaster, but to the school itself, it is a pertuity, and the general words for instructing 3 boys, means 3 in succession one after another.

THOMAS Cheeseman by will dated the 20th of *March* 1730. devised in the words following, I give to the charity school of *Yeovill*, to be paid 12 months after my decease, *the full and whole sum of* 50*l.* " *Item*, I give unto the Latin school, if any " man is possessed of it, that teacheth boys, and is richly " grounded in the Latin tongue, the sum of five pounds, to " be paid him yearly for teaching and instructing three boys. " *Item*, I give to the poor of *Yeovill* fifty shillings a year, to " be paid every *Easter* after my decease, out of my estate of " *Homer*, to be paid by my executrix. *Item*, I give my wife " *Sarah Cheeseman*, that estate in *Homer* in the parish of *Trent*, " and also that at *Wandall* in the parish of *Mudford*, to her " and her heirs for ever, and made *Sarah* executrix."

Mr. *Partridge* was schoolmaster, but 5*l.* a year hath not been paid to him.

The commissioners named under a commission of charitable uses ordered, that *Sarah* should within one month after notice pay to the defendant *Partridge* the sum of 10*l.* &c. and that the proprietor of the lands called *Homer*, for the time being, should for ever pay unto such person as should be schoolmaster, the yearly sum of five pounds, by equal half yearly payments at *Michaelmas* and *Lady Day*, and decreed that the lands called *Homer* were charged with the payment of 5 *l.* for ever.

To which decree Mrs. *Cheeseman* took exceptions, insisting that she is not, nor ought to be bound thereby. [437]

First, For that the messuage, tenement and premisses, called *Homer*, devised to her, are not by the will charged with the payment of 5*l.* a year, to such person, and for such purposes, as in and by the decree hath been adjudged.

Secondly, For that if the said tenement and premisses were charged with the five pounds a year, the same was not by the will *made a perpetual charge thereon*, nor payable at such times, and

CHEESEMAN v. PARTRIDGE. and in such proportions, as by the said decree is likewise adjudged.

Lord Chancellor: The will is so inaccurately penned, that I believe this man made it himself; but though it cannot take place according to the words, I must make such construction as is most agreeable to the intention.

There seems to be two intentions of this testator.

First, To give his money legacies independant of his annuities, and in gross sums; for the first legacy is the full and whole sum of fifty pounds, *to be paid* a *twelvemonth after his death*.

Secondly, An annuity of five pounds, and another of fifty shillings, to be paid yearly every year after his decease.

The question is, Whether the annuity of five pounds is a charge upon the estate at *Homer*.

In the first place, What is to be the continuance of this five pounds *per ann.* and that will determine in some measure the other question, Whether the estate at *Homer* will be liable to answer it.

A gift to the parish church of *A.* has been construed a gift to the parson and parishioners of *A.* and their successors for ever.

Now I am of opinion, that this was intended by the testator as a perpetuity, for he did not give it to a particular schoolmaster, but to the school itself, which is like the old case of a gift to the parish church of St. *Andrew*, *Holborn*, which was construed to be a gift to the parson and parishioners of St. *Andrew*, and their successors for ever.

Another circumstance, that it is in general words, for the instruction *of three boys*, which must be understood to mean three boys in succession.

There can be no question as to the charging his estate at *Homer*, for he has made it liable in express terms, and the calling his wife executrix in this clause, is only another description of her, for the words immediately following give the inheritance to the wife in this estate (1).

I am of opinion it cannot be charged upon testator's personal estate, because the real estate is expresly set apart to answer the annuities; for what the testator means by his respective legacies, are the pecuniary sums, or sums in gross, that are before given in other parts of his will.

The next question is, As the fund intended for the school is not sufficient, Whether the estate at *Homer* be liable to make up the deficiency.

[438]

Item in a will a conjunctive in the sense of *and* or *also* and is only made use of to distinguish clauses.

Item ought to be construed as a conjunctive in the sense of *and*, or *also*, to connect the two sentences together, and make the estate at *Homer* as much liable to one annuity as the other. For *Item* has never been construed a disjunctive, but is only made use of to distinguish the clauses in the will; the cases of *Cole* v. *Rawlinson*, 1 *Salk.* 234. and *Hopewell* and *Ackland*, 1 *Salk.* 239. are in point for this purpose.

(1) *Vide Edgell* v. *Haywood*, *post.* 3 vol. 352. 357.

The time of payment is at *Easter*, and as it is directed to be paid yearly, which naturally intends taxes, this court cannot alter it to half yearly payments, and clear of taxes.

CHEESEMAN v. PARTRIDGE. Where a will directs payments out of land yearly, at a particular time, it cannot be altered to half yearly payment.

I do therefore order that the exceptions be over ruled, save as to the time for payment of the five pounds a year, and as to that, the said exceptions must be allowed, and that so much of the said commissioners' decree, as directs the five pounde *per ann.* to be paid half yearly at *Michaelmas* and *Lady Day*, be reversed, and I do order that the arrears be forthwith paid to the respondent, and that the five pound for the future be paid yearly at *Easter*, subject to the land tax, and I affirm the rest of the decree (1).

(1) *Reg. Lib. A.* 1739. fol. 208.

For more of Devises, *Vide* title *Bill, under the Division, Bills of Discovery.*

Vide title *Exposition of Words.*

Vide title *Dower and Jointure.*

Vide title *Legacy.*

Vide title *Legacy, under the Division, Ademption of a Legacy.*

Vide title *Conditions and Limitations.*

C A P. XLI.

Distribution.

Vide title *Executors and Administrators, under the Division, Who are intitled to a Distribution.*

Vide title *Exposition of Words.*

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[439]

C A P. XLII.

Dower and Jointure.

(A) *What shall be a good Satisfaction, or good Bar of Dower, and how far a Doweress shall be favoured in Equity.*

(B) *Of making good a Deficiency out of a Husband's Assets.*

(C) *Of what Estate of the Husband, with respect to the Nature and Quality thereof, shall a Woman be endowed.*

CHEESEMAN v. PARTRIDGE.

and in such proportions, as by the said decree is likewise adjudged.

Lord Chancellor: The will is so inaccurately penned, that I believe this man made it himself; but though it cannot take place according to the words, I must make such construction as is most agreeable to the intention.

There seems to be two intentions of this testator.

First, To give his money legacies independant of his annuities, and in gross sums; for the first legacy is the full and whole sum of fifty pounds, *to be paid* a *twelvemonth after his death*.

Secondly, An annuity of five pounds, and another of fifty shillings, to be paid yearly every year after his decease.

The question is, Whether the annuity of five pounds is a charge upon the estate at *Homer*.

In the first place, What is to be the continuance of this five pounds *per ann.* and that will determine in some measure the other question, Whether the estate at *Homer* will be liable to answer it.

A gift to the parish church of *A.* has been construed a gift to the parson and parishioners of *A.* and their successors for ever.

Now I am of opinion, that this was intended by the testator as a perpetuity, for he did not give it to a particular schoolmaster, but to the school itself, which is like the old case of a gift to the parish church of St. *Andrew, Holborn*, which was construed to be a gift to the parson and parishioners of St. *Andrew*, and their successors for ever.

Another circumstance, that it is in general words, for the instruction *of three boys*, which must be understood to mean three boys in succession.

There can be no question as to the charging his estate at *Homer*, for he has made it liable in express terms, and the calling his wife executrix in this clause, is only another description of her, for the words immediately following give the inheritance to the wife in this estate (1).

I am of opinion it cannot be charged upon testator's personal estate, because the real estate is expressly set apart to answer the annuities; for what the testator means by his respective legacies, are the pecuniary sums, or sums in gross, that are before given in other parts of his will.

The next question is, As the fund intended for the school is not sufficient, Whether the estate at *Homer* be liable to make up the deficiency.

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Item in a will a conjunctive in the sense of *and* or *also* and is only made use of to distinguish clauses.

Item ought to be construed as a conjunctive in the sense of *and*, or *also*, to connect the two sentences together, and make the estate at *Homer* as much liable to one annuity as the other. For *Item* has never been construed a disjunctive, but is only made use of to distinguish the clauses in the will; the cases of *Cole* v. *Rawlinson*, 1 *Salk.* 234. and *Hopewell* and *Ackland*, 1 *Salk.* 239. are in point for this purpose.

(1) *Vide Edgell* v. *Haywood, post.* 3 vol. 352. 357.

The time of payment is at *Easter*, and as it is directed to be paid yearly, which naturally intends taxes, this court cannot alter it to half yearly payments, and clear of taxes.

CHEESEMAN *v.* PARTRIDGE. Where a will directs payments out of land yearly, at a particular time, it cannot be altered to half yearly payment.

I do therefore order that the exceptions be over ruled, save as to the time for payment of the five pounds a year, and as to that, the said exceptions must be allowed, and that so much of the said commissioners' decree, as directs the five pounde *per ann.* to be paid half yearly at *Michaelmas* and *Lady Day*, be reversed, and I do order that the arrears be forthwith paid to the respondent, and that the five pound for the future be paid yearly at *Easter*, subject to the land tax, and I affirm the rest of the decree (1).

(1) *Reg. Lib. A.* 1739. fol. 208.

For more of Devises, *Vide* title *Bill, under the Division, Bills of Discovery.*

Vide title *Exposition of Words.*

Vide title *Dower and Jointure.*

Vide title *Legacy.*

Vide title *Legacy, under the Division, Ademption of a Legacy.*

Vide title *Conditions and Limitations.*

CAP. XLI.

Distribution.

Vide title *Executors and Administrators, under the Division, Who are intitled to a Distribution.*

Vide title *Exposition of Words.*

CAP. XLII.

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Dower and Jointure.

(A) *What shall be a good Satisfaction, or good Bar of Dower, and how far a Dowress shall be favoured in Equity.*

(B) *Of making good a Deficiency out of a Husband's Assets.*

(C) *Of what Estate of the Husband, with respect to the Nature and Quality thereof, shall a Woman be endowed.*

(A) *What shall be a good Satisfaction, or good Bar of Dower, and how far a Dowress will be favoured in Equity.*

June the 2d, 1739.
Case 199.

Glover v. *Bates.*

A provision for a wife, in articles before marriage, declared to be in full satisfaction of dower, or any claim or right by common law, custom of the city, *or any other usage, law or custom notwithstanding*. The wife survived the husband, and accepted of the terms mentioned in the articles. This demand of the wife may be extinguished by agreement, but as she was an infant when the articles were signed, had her election at her husband's death, which she has made by accepting what was designed as a satisfaction for dower.

IN articles made before marriage, it was expresly provided, that the terms therein mentioned should be to the wife, in full satisfaction and recompence of all right and claim of dower, or any claim or right by common law, custom of the city, *or any other usage, law or custom notwithstanding.*

The wife lived some time after the death of her husband, who died intestate, and she accepted of the terms mentioned in the articles. Upon her death her representative brought a bill to have her distributory share of the husband's estate, notwithstanding these articles.

Lord Chancellor: The first question is, If the wife is bound by these articles.

This demand of the wife (if she had in her life demanded it), tho' not properly the subject matter of a release, yet may certainly be extinguished by agreement; she was an infant at the time of entering into this agreement, therefore, at the death of the husband, she had her election (1), and she has made it by accepting what was designed by the articles as a satisfaction, which plainly shews her sense of the articles.

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The words in the articles, *any law, usage, or custom notwithstanding*, extend to the husband's personal estate, and bar the wife of her share under the statute of distributions.

The next question is, If upon the construction of this agreement it can extend to bar her distributary share? And it is objected that this proviso was only to leave the estate in the power of the husband to dispose of, in case he had made a will, and so this claim not inconsistent; and indeed, with respect to the custom of *London*, it generally is thus understood; but where such express words are used as here, *any law, usage, or custom notwithstanding*, it is plain he intended his estate should go to his relations, exclusive of any claim of the wife, and as she must claim under the statute of distributions, which is a law, it is expresly provided against.

His Lordship therefore ordered the plaintiff's bill to stand dismissed, with costs according to the course of the court.

(1) See *Harvey* v. *Ashley*, *post*. 3 vol. 607.

N. B. The cases of *Badcock* v. *Lovell* (1), in *M. T.* 1726. and *Davila* v. *Davila*, before Lord Chancellor *Cowper*, 2 *Vern.* 724, and *Lockier* v. *Savage* (2), in the court of Exchequer, were cited by Mr. Attorney General for the defendants where the words *or otherwise* were held to extend to bar the distributory share (3)

GLOVER v. BATES.

(1) 7 *Vin.* 211. *pl.* 24. S. C.
(2) 2 *Stra.* 947. S. C. 2 *Eq. Ab.* 260. *pl.* 4. 272. *pl.* 36.
(3) See also *Read* v. *Snell*, *post.* 2 vol. 642. where under a similar clause, the wife was barred of her paraphernalia bequeathed to her by her husband's will.

(B) *Of making good a Deficiency out of a Husband's Assets.*

May the 11th, 1739. Easter Term.

Probert v. *Morgan* and *Clifford.*

THIS was a bill brought by the plaintiff to have the deficiency of her jointure supplied out of the assets of her husband and his father, and also for 1000 *l.* left her by her husband, payable with interest from three months after his death, and likewise to have her *paraphernalia* made good.

Case 200.
S. C. Amb. 6.
S. C. 2. Cox's P. W. 544. in note fully.

A bill by the plaintiff to have the deficiency of her jointure made good out of the assets of her husband and his father, and also for 1000 *l.* left her by her husband, payable with interest from three months after his death, and for her *paraphernalia.* Where the father and son are parties to the marriage contract, she has a lien both upon the estate of her father and son. An account of assets was decreed, and that the deficiency should be made good out of the son's estate, it appearing that he received most of the fortune.

On the marriage of *Robert* the son with the plaintiff, the father and son both covenanted that the lands settled upon her for her jointure were worth 300 *l. per ann.* part of which lands were woodlands, but the whole original income was not worth 300 *l.*

Lord Chancellor: In marriage contracts, when the fortune of the wife is paid to the father, or to clear incumbrances, or to the son and the father and the son are parties to the marriage contract, the wife has a lien both upon the estate of the father and son.

As to the woodland part of the estate, it appearing that notwithstanding a valuation was made of what arose from the felling of timber and cutting wood every year, a deficiency still remained to satisfy the jointure. An account of assets was decreed, and that the deficiency in the jointure should be made good out of the personal estates of the father and son pursuant to their covenant, and in case that should prove deficient, then out of their real estates liable to their debts by specialty. [441]

PROBERT v. MORGAN.

The 1000*l.* given by the will to the wife, cannot be considered as a satisfaction for the deficiency of her jointure, for as the jointure lands are covenanted to be worth so much clear of all reprises, the testator intended the 1000*l.* as a bounty.

Lord Chancellor held, that the legacy of 1000*l.* given by will to the wife, ought not to be considered in this case as a satisfaction for the deficiency of her jointure, because that did not arise till after his death, and therefore could not, at that time, be in his consideration; and as the jointure lands are covenanted by the marriage settlement to be worth so much clear of all reprizes, the testator plainly intended the 1000*l.* as a bounty to her.

There was another question, Out of what fund this legacy was to be paid? For by the marriage settlement (1), the husband had a power to charge the estate with 2000*l.* after the death of his wife, and a term of years was raised for that purpose.

The words of the husband's will were, *First, I charge all my real estate*, &c.

If a person in the execution of a power sufficiently describes the estate he had a *power* to charge, the estate is bound, tho' there is no reference to the deed out of which the powers arises.

Lord Chancellor: If a man has a *power* to charge an estate, it is not necessary, in the execution of it, he should refer to the deed out of which the power arises; for in a court of equity it is enough that his intent appears, and if in the execution he sufficiently describes the estates he had a power to charge, the estate is certainly bound, especially where the person charging is a purchaser of the power (2.)

He has indeed mistaken a circumstance with respect to the time of raising it, but that will not make it void (3).

It is insisted for the plaintiff, that as the husband by his will left her the 1000*l.* payable with interest, the interest should be made good till it amounted to the sum of 2000*l.* which he had a power to raise.

But his Lordship said, as to that the 1000*l.* being the only charge upon the estate, he was of opinion that the interest should not be made good out of the power, for that is to charge the estate with the principal sum of 2000*l.* (4).

With regard *to the paraphernalia*, it was strongly insisted upon by the counsel for the defendant, that the wife cannot stand in the place of bond creditors; and the case of *Tipping* v. *Tipping*, 1 *Wms.* 729. was cited for that purpose.

(1) By another settlement subsequent to the marriage.

(2) *Ex parte Caswal, post.* 559, 560. But in such cases, it must appear, that the person who has the power, *intended* to execute it. *Moulton* v. *Hutchinson, post.* 558. *Andrews* v. *Emmot*, 2 *Bro. Cha. Rep.* 297.

(3) The sum of 2000*l.* was to be raised *two* years after the term should come into possession.

(4) His Lordship reserved the consideration, whether interest was to be allowed upon the sum of 1000*l.* from 3 months after the testator's death to be made good out of the real estates descended or the real estates devised, *Reg. Lib. B.* 1738. *fol.* 310.

Lord

Lord Chancellor: Where there are real estates descended, the wife may be intitled to her *paraphernalia* (1); but otherwise in this case, where the real estates came by the husband, and said the case in 2 *Vern.* 246. had been carried full far enough, for though it is there laid down that where *A.* dies intestate, or by will doth not dispose of the jewels, his wife may claim, in case * there be no debts, the jewels suitable to her quality to be worn as the ornaments of her person; yet by the old law they were absolutely in the power of the husband (2): And if he by will devised away the jewels, such devise should stand good against the wife's claim of *paraphernalia* (3). *Cro. Car.* 343. and 1 *Roll. Abr.* 911. *sec.* 9.

PROBERT v. MORGAN.

Where there are real estates descended, the wife may be intitled to her *paraphernalia*, but otherwise in this case, where the real estates came by the husband.

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(1) Decreed, that if the personal estate is sufficient to pay debts, then the plaintiff is intitled to have her *paraphernalia*: but if not sufficient, then she is to have satisfaction out of the real estates *descended*. *Reg. Lib. B.* 1738. *fol.* 310. *Sed vide Incledon* v. *Northcote*, *post.* vol. 43[illegible]

(2) So *Graham* v. *Londonderry*, *post.* 3 vol. 394.

(3) *Contra Northey* v. *Northey*, *post.* 2 vol. 77 *Seymore* v. *Tresilian*, *post.* 3 vol. 358. See *Snelson* v. *Corbet*, *post.* 3 vol. 369

(C) *Of what Estate of the Husband, with respect to the Nature and Quality thereof, shall a Woman be endowed.*

June the 22d, 1738. At the Rolls.

Sneyd v. *Sneyd*.

THE plaintiff's father, *Ralph Sneyd*, being, by virtue of two settlements, seised in tail male of several manors and lands, and in possession of great part thereof, and having purchased several others, intermarried with the defendant the plaintiff's mother, but no settlement was made in consideration of the marriage; and on the 18th of *October* 1733, he died intestate, leaving the plaintiff *Dryden Sneyd*, his eldest son, whereby the lands in the settlement, and the estates purchased by the father, became vested in the plaintiff, as the eldest son and heir in tail.

Case 201.

The plaintiff's father, being seised in tail male of several manors and lands, and in possession of great part thereof, and having purchased several others, intermarried with the defendant the plaintiff's mother, and in *October* 1733 died intestate. The plaintiff, as eldest son and heir in tail, brings a bill to set aside the assignment of dower for partiality, upon a suggestion that part of the estate was copyhold and not liable thereto.

If the husband became intitled to the copyhold estates by copy of court roll, and granted them out again by copy of court roll, his wife is not intitled to dower; but if he became intitled otherwise than by copy of court roll, and did not grant them out again by copy of court roll, she is intitled to dower out of those estates.

The defendant claiming dower out of the plaintiff's estate, obtained judgment in a writ of dower against him, and dower was afterwards assigned by the sheriff; and the present bill is brought for an account of the rents of the real estate, and to set aside the sheriff's assignment of dower for partiality, part of the estate

SNEYD v. SNEYD.

estate being copyhold, and not liable to dower, and yet estimated upon the writ of inquiry for ascertaining of dower.

The defendant insisted the copyhold was properly estimated, because *Ralph Sneyd* her husband, had the freehold of the purchased copyhold estates in him as lord of the manor, which contained as well copyhold as freehold, and by him not granted out, and that she is therefore dowable of the said copyhold, or that if he did grant them out, the instantaneous seisin in the husband, at the time of the purchase, was sufficient to intitle her to such dower, and that no after-act of his could give away that right which was once attached in her.

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* Sir *Joseph Jekyll.*

A wife is not intitled to dower out of an instantaneous seisin. The conusee of a fine is not so seised as to give his wife a title to dower; nor in the case of a use has the widow of a trustee any claim of dower from such a momentary seisin in her husband.

The Master of the Rolls *: Though no cases have been cited of either side, and seems to be a new point, yet I should think that this instantaneous seisin of the freehold of the purchased copyhold estates in the husband, will not intitle the defendant's wife to her dower; for notwithstanding there may be no case of the same nature with this, yet it may be governed by reason and general rules of law: as for instance, *the conusee of a fine is not so seised as to give his wife a title to dower*; and in the case of a use, the widow of a trustee has been determined to have no claim of dower from such a momentary seisin.

I do therefore in the first place decree, *that the assignment of dower by the sheriff be set aside*, and that it be referred to a Master to inquire, whether the intestate became intitled to the copyholds in question, by virtue of surrenders from the tenants by copy of court roll, or not? And whether he granted those estates out again by copy of court roll, and not by lease for years or lives? *And if the intestate became intitled by copy of court roll, and granted them out again by copy of court roll, then I am of opinion that the defendant* Anne Sneyd *is* not *intitled to dower out of those estates.*

And as to the lands whereon the leases for lives or years were renewed by the intestate, I do order the Master to inquire which of those leases were actually expired at the time of such renewal, and which not; *and am of opinion, that the defendant* Anne *is not intitled to dower out of an instantaneous seisin, but that she is intitled to dower out of those lands where the Master shall find that the leases were* actually expired (1).

(1) *Reg. Lib. B.* 1737. *fol.* 448.

November the 12th, 1739. and *July* the 1st, 1740.

Hervey v. *Hervey*.

Vide title *Power, under the Division, Of the right Execution of a Power, and where a Defect therein will be supplied.*

CAP. XLIII.

Ejectment.

Vide title *Jointenants and Tenants in Common.*

CAP. XLIV. [444]

Estate Tail.

Ivie v. *Ivie.* *May the 2d, 1738.*

Vide title *Devise, under the Division, What Words pass an Estate Tail.*

CAP. XLV.

Evidence, Witnesses, and Proof.

(A) *What will be admitted as Evidence, and will amount to sufficient Proof.*

(B) *Where parol, or collateral Evidence, will or will not be admitted to explain, confirm, or contradict what appears on the Face of a Deed or a Will.*

(C) *Of examining Witnesses* de bene esse, *and establishing their Testimony* in perpetuam rei memoriam.

(D) *Of the Sufficiency or Disability of a Witness.*

(E) *Rules the same in Equity as at Law.*

(A) *What will be admitted as Evidence, and will amount to sufficient Proof.*

Graves v. *Eustace Budgel,* Esq; *May the 5th, 1737.*

Case 202. This court will allow the proving of exhibits *viva voce* at the hearing, but not to let in other examinations, and this only at the application of the party who is to make use of the exhibits, but no instance where it is allowed at the application of the contrary party.

IT was moved on the defendant's behalf, that certain witnesses of the plaintiff's, who were to prove exhibits, might be examined *vivâ voce* at the hearing of the cause; and that an order

Graves v. Budgell.

order of the late Chancellor, for a commission to examine them in the country, might be discharged.

The motion was founded on two things.

[445] *First*, The great importance of these exhibits to the merits of the cause, being receipts of the defendant, which he insisted were forged. and had denied in his answer.

Secondly, The ill state of health of the defendant disabling him to go down into the country to attend the commission, in support of which an affidavit of his physician was read.

On these matters it was prayed that the witnesses might be examined *vivâ voce* at the hearing, that the defendant might have an opportunity of cross-examining them, and sifting their evidence; and a case of the Dutchess of *Newcastle* was mentioned by Mr. *Fazakerley*, where it was so allowed. This was also prayed in honour of the defendant, he having denied the receipts.

Lord Chancellor: I cannot allow the motion; the constant and established proceedings of this court are upon written evidence, like the proceedings upon the civil or canon law. This is the course of the court, and the course of the court is the law of the court; and though there are cases of witnesses being so examined, yet they have been allowed but sparingly, and only after publication, where doubts have appeared in their depositions, and the examination has been to clear such doubts, and inform the conscience of the court.

There never was a case, where witnesses have been allowed to be examined at large at the hearing; and though it might be desirable to allow this, yet the fixed and settled proceedings of the court cannot be broke through for it.

The utmost latitude the court have taken in this, is to allow the proving of exhibits *vivâ voce* at the hearing, but not to let in other examinations; and this is allowed only where the application is by the party who is to make use of the exhibits: but there never was a case where it was allowed on the application of the contrary party; if he is suspicious of fraud, he has notice, and may cross examine the witnesses.

Easter Term, 1737.

Fry v. *Wood*.

Case 203. Where a person has been examined here, his deposition may be read at law between the same parties.

AGreed in this case, where a person has been examined in Chancery, that in a cause at law between the same parties, his deposition may be used in evidence, if it can be proved that the witness is dead, or by reason of sickness, &c. is not able to attend, or that he is out of the kingdom, or otherwise not amenable to the process of the court (1).

(1) See *Bull. Nisi Pri.* 236. 238, 239.

In Michaelmas Vacation, 1737.

Goodier v. *Lake*.

WHERE an original note of hand is lost, and a copy of it is offered in evidence to serve any particular purpose in a cause, you must shew sufficient probability to satisfy the court that the original note was genuine, before you will be allowed to read the copy. Case 204. Where an original note is lost, and a copy of it is offered in evidence, you must shew the original note was genuine, before you will be allowed to read the copy.

Metcalf v. *Ives*. *June* the 18th, 1737.

Vide title *Award and Arbitrament, under the Division, For what Causes set aside.*

Michaelmas Term, 1744.

Omichund v. *Barker*.

Vide title *Alien*.

Ramkissenseat v. *Barker*. *December* the [illegible]th, 1749.

Vide title *Alien*.

Eade v. *Thomas Lingood*, and Others. *May* the 23d, 1747.

Vide title *Bankrupt, under the Division, Rule as to Examinations taken before Commissioners.*

Evidence. Vide title *Power*.

Hilary Term, 1737. [447]

Goden and Others, Assignees of *Dellow*, a Bankrupt, v. *Dellow* and Others.

Vide title *Bill, under the Division, Bills of Discovery*, &c.

(3) *Where Parol, or Collateral Evidence will or will not be admitted, to explain, confirm, or contradict, what appears on the Face of a Deed or a Will.*

Vacation after Trinity Term, 1737.

Taylor v. *Taylor*.

Vide title *Copyhold, under the Division, In what Cases a defective Surrender, or the Want of it, will be supplied in Equity.*

[illegible] the 4th, [illegible]

Case 205.

Hutchins v. *Lee*.

Bill brought to set aside an assignment of a leasehold estate, &c. upon suggestion that it was not intended as an absolute assignment, but subject to a trust for the plaintiff's benefit.

BILL brought to set aside an assignment of a leasehold estate, and all other the estate and effects of the plaintiff, upon a suggestion that the same was never intended as an absolute assignment for the benefit of the defendant, but made only to ease the plaintiff of the trouble and care of managing his own concerns at that time, (being then under great infirmities of body and mind), and subject to a trust for the benefit of the plaintiff, if he should afterwards be in a capacity of taking care of his own affairs.

Though no express trust in the deed, yet as it might be collected from circumstances arising out of the assignment itself inconsistent with an absolute disposition: *Lord Chancellor* admitted parol evidence to explain this transaction.

No trust of any kind appeared on the face of the assignment, but upon the whole circumstances of the case, (*viz.*) the annuity reserved to the plaintiff, being by no means equivalent to the estate so disposed of, the recital in the deed of assignment, that the plaintiff was under a disability at that time, of taking care of his own affairs, all the effects in general being assigned as well as the leasehold estate, and after a general covenant in the deed from the defendant, to indemnify the plaintiff against any breach of covenant in the original lease, and a special reservation to the plaintiff of all the timber, &c. and he to set out, and allow timber for the repair of the estate (1), (a circumstance principally relied on by *Lord Chancellor*, as not at all reconcileable with an absolute disposition of the whole interest to the defendant), and other circumstances raising a strong presumption of a trust intended.

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Tho' there can be no parol declaration of a trust since the 29 *Car.* 2. yet parol evidence proper in avoidance of fraud.

Lord Chancellor admitted parol evidence to explain this transaction, *viz.* declarations by the defendant at the time the deed of assignment was executed, and afterwards amounting to an acknowledgment of such a trust as the plaintiff now insisted on; and his Lordship said, such evidence was consistent with the deed, as there was all the appearance of an intended trust upon the face of it; but however though there can be no parol declaration of a trust, since the statute of the 29 *Car.* 2. yet this evidence is proper in avoidance of fraud, which was here intended to be put on the plaintiff, for the defendant's design was absolutely to deprive the plaintiff of all the benefit of his estate (2).

(1) These covenants do not appear in the Register's book.

(2) Decreed, that the defendant should reconvey the estate to the plaintiff. *Reg. Lib. A.* 1737. *fol.* 406. See *Thynn* v. *Thynn*, 1 *Vern.* 296. *Oldham* v. *Litchford*, 2 *Vern.* 506. *Willis* v. *Willis*, *post.* 2 vol. 71.

Whitton v. Russell.

July the 28th, 1739.

Case 206.

S. C. 1 Ves. 124. cited.

THE testator left *A.* 20*l.* *per ann.* by a codicil to his will, and after talking of making another codicil, and leaving him 15*l.* *per ann.* more, the attorney told him, that if *B. C.* and *D.* whom he had made devisees of his estate, would give *A.* a bond to pay him 15*l.* *per ann.* it would be sufficient, accordingly *B.* *one of the devisees present promised that he and the devisees would*, and a draft was prepared but not executed. The testator lived five weeks after this transaction, and *A.* remained nine years without demanding the performance of the promise, or insisting to have the draft perfected, and then brought his bill. The defendant denied the promise, and the plaintiff's bill was dismissed at the Rolls, who thereupon appealed; the cases cited for the plaintiff were *Oldham* v. *Litchfield*, 2 *Vern.* 506. *Thynn* v. *Thynn*, 1 *Vern.* 296. *Devenish* v. *Baines*, *Prec. in Chan.* 3. and *Blackett* v. *Blackett*, *July* 20, 1720.

A person left *A.* 20*l.* *per ann.* by a codicil to his will, and after talking of making another codicil and leaving him 15*l.* more, the attorney told him, that if *B. C.* and *D.* whom he had made devisees of his estate, would give *A.* a bond to pay him 15*l.* *per ann.* it would be sufficient; *B.* being present, promised that he and the devisees would, and a draft was prepared, but not executed; testator lived 5 weeks after, and *A.* remained 9 years without demanding the performance of the promise or draft to be perfected, and then brings his bill, dismissed at the Rolls, and upon appeal, decree of dismission affirmed (1).

Defendant by his answer insisted on the statute of the 29 *Car.* 2. for prevention of frauds and perjuries.

Lord Chancellor: These cases upon the statute of frauds are to be proceeded on with the greatest caution. The present plaintiff does not appear to be any relation of the testator, and I think there is no ground on the parol evidence to decree for the plaintiff in the present case, though the cases cited go a great way.

The present attempt is, in effect, to add a legacy to a will and codicil in writing, by parol proof, which, if relating to * personal estate only, ought not to be allowed; but this goes further, and seeks to charge lands with an annuity of 15*l.* *per ann.* without writing, expresly against the statute of frauds; and in the next place to have a specifick performance of an agreement not in writing, which this court will not do.

This court will not add a legacy to a will upon parol proof, tho' it concerns the personal estate only: *a fortiori* where it tends to charge lands.

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Neither is there, in the present case, any ground for relief on the head of accident or fraud: at the time of making the will, the testator talks only with one of the devisees of giving 15*l.* *per ann.* more to the plaintiff.

The testator lived *five* weeks afterwards, when it was always in his power, but does nothing towards it; therefore there was no accident to prevent it, nor is it in the power of this court to relieve against accidents, which prevent voluntary dispositions of estates; nor is there any clear fraud: every breach of promise is not to be called a fraud, nor does it appear, that the testator was drawn in by this promise, not to add the legacy to this codicil.

It is not in the power of the court to relieve against accidents, which prevent voluntary dispositions of estates.

(1) But see *Reech* v. *Kennegal*, 1 *Ves.* 123, and *Drakeford* v. *Wilks*, *post.* 3 vol. 539.

WHITTON *v.* RUSSEL.

As to the precedents cited, *Thynn* v. *Thynn*; *Oldham* v. *Litchfield*, they do neither of them come up to the present case. *Blacket* v. *Blacket* depended on the reason of younger children unprovided for, yet that went a great way. I cannot come into the reason of this case, unless for the younger children.

But here the great opportunity the testator had of doing this in a much shorter way than by bond, if he thought fit; the draft was imperfect, it not being inserted what the undertaking of the obligor should be, and the length of time before the bill brought, are material facts.

Demands of this kind should be pursued very recently, for the danger of perjury intended to be prevented by the statute, increases much more after length of time, and therefore are strong objections.

The undertaking and promise is not by all the persons interested, but by one only; the cases cited are, where the promise is made by the person solely interested, and therefore a decree to make the estate liable, would be to affect persons no way concerned in the first transaction, and to charge him who made the promise, would not be consistent with the intent of the testator, who meant only to charge the lands.

Therefore I am of opinion, the decree at the Rolls was cautiously made, and ought to be affirmed.

[450] (C) *Of examining Witnesses* de bene esse, *and establishing their Testimony* in perpetuam rei memoriam.

August the 9th, 1739.

The Earl of Suffolk v. *Green* et al'.

Case 207.

S. C. 2 Eq. Cas. Abr. 79. pl. 14.

Bill brought to perpetuate the testimony of witnesses to a bond charged to be usurious, and alledging that the defendant *Green*, whom the plaintiff wanted to examine, was very aged and infirm.

Green, who was a *nominee* only in the bond, demurred, as the bill sought to subject him to a penalty, and also as plaintiff does not offer to pay what is really due.

If demurrer had stopt at the first part, it would have been good, but as it goes to the perpetuating the testimony, it is bad, and over-ruled, but without prejudice to the defendant's insisting on the same thing by way of answer.

THE plaintiff brought his bill to perpetuate the testimony of witnesses to a bond, entered into by the plaintiff's ancestor, charging that the defendant *Green*, whom the plaintiff wanted to examine, was very aged and infirm, and insisted in his bill, that the bond was entered into on an usurious contract, the defendant being to have 10 *l.* *per cent.*

The defendant demurred, for that the bill sought to subject him to a penalty, and that, on the plaintiff's own shewing, there was a great sum really lent, but the plaintiff does not offer to pay what is really due to the defendant.

For the plaintiff was cited the case of *Shirley* v. *Earl Ferrers*, 3 *Wms.* 77. where a bill was brought to perpetuate the testimony of a witness, for fear he should die during a long vacation, and he was ordered to be examined *de bene esse*, where the thing examined into lay only in the knowledge of the witness, and

was

Earl of Suffolk v. Green.

was a matter of great importance, *tho' the witness was not proved to be old and infirm.*

The defendant *Green* was only a *nominee* in the bond, and the beneficial interest in one *Peers*.

Lord Chancellor: So far as the present bill prays the defendant to put in an answer, so far it is a bill of discovery, for the answer must necessarily go to the usury charged in the bill.

The defendants have demurred to so much of the bill as seeks any discovery, and to perpetuate the testimony.

A trustee has as much the benefit of the pleading of this court, as he that has the equitable interest, and *cestui que trust* is intitled to have the privilege maintained by the trustee.

As to the first part, that it would subject the defendants to a penalty, the demurrer is proper, and if it had gone no further, must have been allowed as an usual case. For as to the objection, that the defendant *Green* will lose nothing by the discovery, as he has no interest; a trustee has as much the benefit of the pleading of this court, as he that has the equitable interest, nay, the *cestuique trust* is intitled to have the privilege maintained by the trustee.

A plaintiff is intitled to perpetuate the testimony of witnesses to an usurious contract, notwithstanding his not offering by the bill to pay.

A man may bring a bill to perpetuate testimony in many cases, where he cannot bring a bill for relief, without waiving the penalty, as in waste, &c.

*But as to the other part of perpetuating the testimony, the demurrer is bad, for the plaintiff is intitled to perpetuate testimony, notwithstanding his not offering to pay; and there is no certain distinction laid down, where a man is forbid to perpetuate testimony, as to personal demands against himself. So far as this, if proved, relates to the loss of the debt, so far it may be called a penalty; but a man may bring a bill to perpetuate testimony in many cases, where he cannot bring a bill for relief, without waiving the penalty; *as in waste*, or *in the case of a forged deed*, or in the case of insurances after commissions to examine witnesses beyond sea, as to fraudulent losses, and yet in many cases fraudulent losses are subject to a penalty, even sometimes felonious. This bill is to perpetuate testimony to a plain fact, what the consequence of that fact is, is of another consideration.

[*451]

A demurrer bad in part, is void *in toto*, otherwise as to a plea.

This demurrer, being bad in part, must be over-ruled, for it is not like a plea, which may be allowed in part: but a demurrer bad in part is void *in toto* (1), and cannot be separated.

His Lordship therefore held the demurrer to be insufficient, and ordered the same to be over-ruled, but without prejudice to the defendants insisting by way of answer, against making any discovery touching the usurious contract (2), charged and suggested by the bill.

(1) *Huggins* v. *The York Buildings Company*, *post.* 2 vol. 44. *Baker* v. *Pritchard*, *post.* 2 vol. 389. *Dormer* v. *Fortescue*, *post.* 2 vol. 284. *Earl of Derby* v *Duke of Athol*, 1 *Vez.* 205. *Metcalfe* v. *Hervey*, *ibid.* 2[illegible]. *Bishop of Sodor and Man* v. *Earl of Derby*, 2 *Vez.* 337. Note, There cannot be two demurrers to the same bill. *Bancroft* v. *Wardour*, 2 *Bro. Cha. Rep.* 66. Nor can there be a saving of any thing on a demurrer. *Gregor* v. *Molesworth*, 2 *Vez.* 110.

(2) *Anon.* 2 *Eq. Abr.* 70. *pl.* 7. *Chauncy* v. *Tahourden*, *post.* 2 vol. 393. *Harrison* v. *Southcote*, *post.* 539.

November the 15th, 1738.

Brandlyn v. *Ord.*

Vide title *Purchase, under the Division, Of Purchasers without Notice.*

(D) *Of the Sufficiency or Disability of a Witness.*

Trinity Term, 1738.

Cotton v. *Luttrell.*

Case 208.

Tho' a wife is a defendant, and charged with fraud and mal-practices yet the evidence of the husband shall be admitted where the interest of a third person shall be concerned (1).

THE plaintiff's counsel objected to the evidence of Sir *John Cheshire*, as his wife is charged with fraud and mal-practices, as his testimony might be supposed to go in favour of his lady, by palliating and excusing her conduct, in relation to the procuring her husband to be made a trustee of the whole legal estate under the late Mr. *Cotton*'s settlement; and besides, if the court should be of opinion she has been guilty of a fraud, she will be liable to costs, and his evidence will be favourable to her with respect to costs, and will be in some measure against the rule, that a husband shall not be examined for, or against his wife.

[452]

Mr. *Fazakerley* for the plaintiff insisted, that there is no case extant, where the rule laid down here ought more strongly to prevail, especially where there is such clear evidence of fraud against Lady *Cheshire*. It cannot be disputed, if she is liable, but that the husband, where the wife is concerned, must be likewise liable; and that as every remainder to trustees to preserve contingent remainders, is a vested one, or else would be bad, Sir *John Cheshire* is concerned, for if the court should determine in favour of the plaintiff, he, as having the legal estate, must be decreed to convey.

The objection will hold still stronger against Lady *Cheshire*'s evidence, because she is concerned in interest in the event of the suit, as she may, or may not, be liable to costs, according as the court shall determine upon the merits of the case.

The counsel for the defendant said, the principal question is, Supposing that Sir *John Cheshire* ought not to be examined where the wife is concerned, yet, whether the evidence, both of him and Lady *Cheshire*, should not be read, as here is a third person who is greatly interested under the settlement of Mr. *Cotton*, and can produce no evidence so material as Sir *John Cheshire*'s, who had the framing and perusing of the whole conveyance.

The chief case relied upon for the defendants was *Tyrrel* v. *Holt*, where *Ward* and *Wilbraham*, trustees through the whole estate, (Sir *John Cheshire* being only a trustee to preserve

(1) See *Har. Co. Litt.* 6. *b.* note 6.

con-

Cotton *v.* Luttrel.

contingent remainders), were charged with fraud, and yet the court of King's Bench, upon an issue of fraud, directed out of Chancery, admitted them upon solemn debate to be examined.

A person who at law is [illegible] the *simulcum* may be admitted as a witness, that he may not be made a defendant, only to take off his evidence; but if strong proof that he is *particeps criminis*, he will be excluded from being a witness.

Lord Chancellor: The reason, why persons who at law are put into the *simulcum*, are yet admitted as witnesses, is, that that they may not be made parties to a cause only to take off their evidence: but notwithstanding this, if there is a strong evidence against the *simulcum* man, that he is *particeps criminis*, the court will exclude him from being a witness.

When this objection was first started, I must confess I was very doubtful, whether the depositions of Sir *John Cheshire* and Lady *Cheshire* ought to be read: but, upon the matters being fully discussed, I am of opinion that the objection goes only to their credit, and not their competency.

As to Lady *Cheshire*, the objection depends upon these considerations, Whether she has been properly made a defendant: Now I will not say she has improperly been made a defendant, because it was necessary in order to a discovery; but it was improper she should be brought to a hearing, for she is no ways concerned in interest in the event of this suit, as she was barely an agent for Mrs. *Luttrel*, and consequently no decree can be made against her.

I will not say but there might be a case, where it was necessary to bring such a person to hearing; as suppose *A.* should, by fraud, obtain a conveyance for his own benefit, where it ought to have been in trust only, there might be a decree against such a person.

But this is a bill brought merely to have a reconveyance from the person, to whom it is alledged the estate is fraudulently and illegally conveyed. [453]

But if there is no decree against Lady *Cheshire*, how is it possible that costs should be given against her, for if she is no wa concerned in interest, there can be no decree.

The consequence of this is, that the objection goes only to her credit, and not to her competency.

The next consideration is as to Sir *John Cheshire*; and as I am of opinion that my Lady *Cheshire*'s deposition should be read, the reading his deposition is a consequence of it; for it would be very strange to reject his testimony, when there is not the least colour to say, that he is concerned in the fraud.

Where a feme covert has been guilty of a fraud solely without the husband, no precedent of the court's making him pay costs.

I do not know any case in this court, where a feme covert has been guilty of a fraud solely, without the husband, and where he has no benefit at all from it, that he should suffer, it would be extremely hard to say, that he should pay costs; I know of no precedent, nor do I believe the court would do it.

The depositions of Sir *John* and Lady *Cheshire* read accordingly.

(E) *Rules the same in Equity as at Law.*

Michaelmas Term, 1737.

Manning v. *Leckmere.*

Case 209.
The rules as to evidence are the same in equity as at law (1).

L ORD *Chancellor:* The rules as to evidence are the same in equity as at law, and if *A.* was not admitted as a witness at the trial there, because materially concerned in interest, the same objection will hold against reading his deposition here.

Where two leases are set up, you cannot read one of them, till you have proved possession under that lease.

There are many cases where leases are granted to persons, in which possession upon that lease, and payment of rent, shall be a presumption of right in the lessor, till a better is shewn; but when two leases are set up, you cannot read one of them, till you have proved possession under that lease.

To shew a title in the lessor he must prove actual payment of rent, receipts alone will not do.

Receipts for rent are not a sufficient evidence of a title in the lessor, unless he proves actual payment, especially where the person who has signed the receipt is living, for he ought to have been examined in the cause.

Bailiffs' rentals are evidence of payments.

Where there are old rentals, and bailiffs have admitted money received by them, these rentals are evidence of the payment, because no other can be had.

(1) *Glynn* v. *Bank of England,* 2 *Ves.* 41.

[454]

After Hilary Term, 1736.

The Dutchess of Marlborough v. *Sir Thomas Wheat.*

Case 210.
Masters in Chancery in reports are only to state bare matters of fact.

L ORD *Chancellor* laid it down in this case, that Masters in Chancery in reports which are special, are not to set forth the evidence with their opinions upon it, but only to state the bare matter of fact, for the judgment of the court, in the same manner as in courts of law, they only state the facts allowed by both sides in a special verdict, but never meddle with any part of the evidence on either side.

C A P. XLVI.

Executors and Administrators.

(A) *Who are intitled to a Distribution.*

(B) *Of Administration, to whom to be granted.*

(C) *Of Remedies by one Executor or Administrator against another, and how far the one shall be answerable for the other.*

(D) *What shall be Assets.*

(E) *Rule where a Bill is brought against an Executor of an Executor.*

(A) *Who are intitled to a Distribution.*

Durant and *Frances* his Wife, Administratrix of *Anne Preswood*, deceased ——— } Plaintiffs. *June* the 30th, 1738.

Thomas Preswood and *Charlotte Ann Preswood* Infants, by their Mother and Guardian, and *Ambrose Rhodes* and *Elizabeth* his Wife, } Defendants.

ANNE Preswood died intestate, and letters of administration were granted to the plaintiff *Frances* as her aunt, and one of her next of kin, who would have distributed the personal estate to the intestate's next of kin, according to their interests, *without suit; but defendants insisting they are severally intitled to the whole, the bill is brought in order that an account may be taken of the intestate's personal estate, and that the shares of all persons may be ascertained, and the plaintiffs in right of *Frances* claim one third of the personal estate for their own use.

Case 211. S.C. cited. 2 Ves. 215. Aunts and nephews in the same degree of relation to an intestate and equally intitled under the statute of distributions (1). No right of representation here, but must take *per capita* and not *per stirpes* (2).

[*455] The defendants *Ambrose Rhodes* and *Elizabeth* his wife insisted that in case the plaintiffs, in right of *Frances*, are intitled to a third, they in right of the defendant *Elizabeth* are intitled to a like share, she being the plaintiff *Frances*'s only sister.

(1) *Loyd* v. *Tench*, 2 *Ves.* 213. *Page* v. *Cook*, 2 *Ves.* 214 cited. *Dewes*, 3 *P. W.* 50. *Stanley* v. *Stanley*, *post.* 456. *Loyd* v. *Tench*, 2 *Ves.* 213.

(2) *Walsh* v. *Walsh*, 1 *Eq. Ab.* 249. *pl.* 7. *Pre. Cha.* 54. S. C. *Davers* v. *Page* v. *Cook*, 2 *Ves.* 214. cited.

The

DURANT *v.* PRESTWOOD. The defendants *Thomas*, and *Charlotte Anne Prestwood*, who are the only children of *Thomas Prestwood* deceased, who was the only brother to the intestate, insist that they, as representatives of their father, and nearest of kin to the intestate, are intitled to the whole personal estate.

Lord Chancellor: As by our computation the aunts and nephews are in equal degree of relation to the intestate, they are equally intitled under the statute of distributions, and no right of representation can be here allowed, and, according to the authority of many cases, they are to take *per capita*, and not *per stirpes*, and therefore his Lordship directed, after the satisfaction of debts, the clear surplus of the intestate's personal estate to be divided into four equal parts, one fourth to the plaintiffs, one fourth to the defendant *Thomas Prestwood*, one fourth to the defendant *Charlotte Anne Prestwood*, and the remaining fourth to the defendant *Rhodes*, and *Elizabeth* his wife (1).

Horrel v. *White, in the Court of Exchequer, and Grainger* v. *Granger before Lord* Talbot, *were cited.*

(1) *Reg. Lib. A.* 1737. *fol.* 761.

May the 14th, 1739.

Hans Stanley Esq; and *Elizabeth*, *Anne*, and *Sarah Stanley* (his Sisters) Infants, by *Edward Hooper*, Esq; their next Friend, ——— Plaintiffs.

Phillippa Stanley, Widow, and *Anne Stanley*, Widow, Defendants.

Case 212.
S.C. 2 Ves. 213. cited.

William Stanley, and *Ann* his wife, had two sons, *George* and *Hoby*, who severally married in their father's life-time; *William* the father dies, *Ann* his wife survives him. *George* afterwards dies, and leaves several children, who are still living, then *Hoby* dies intestate, leaving *Phillippa* his wife possessed of a very large personal estate.

The children of *George* bring a bill against *Phillippa*, who has administered to her husband, and also against *Anne* their grandmother, insisting, that, as the representatives of their father, they were intitled with their grandmother to one half of the moiety of the intestate's estate, the wife being intitled to the other moiety, by the 22 & 23 *Car.* 2. *c.* 10.

The residue of the intestate's estate, after satisfaction of debts, directed to be divided into four equal parts, two fourths thereof to be retained by *Phillippa* the intestate's widow, one other fourth part to be paid to *Anne Stanley* the intestate's mother, and the remaining fourth part to be laid out in *South-sea* annuities, in the name of the accomptant general, subject to the order of the court, for the benefit of the children of *George*, equally to be divided.

WILLIAM Stanley and *Anne* his wife had two sons, *George* and *Hoby*, who severally married in their father's life-time; *William* the father dies, *Anne* his wife survives him, *George* afterwards dies, and leaves several children, who are still living; then *Hoby dies intestate* (leaving *Phillippa* his wife) possessed of a very large personal estate.

[456] The children of *George* bring this bill against *Phillippa*, who had administered to her husband, and also against *Anne* their grandmother, insisting that, as the representatives of their father, they were intitled with their grandmother to one half of the moiety of the intestate's estate, the wife being intitled to the other moiety by 22 & 23 *Car.* 2. *cap.* 10.

It

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It was insisted for the plaintiffs, that by the statute of 1 *Jac.* 2. *cap.* 17. *sec.* 7. it is enacted, that if after the death of the father any of his children should die intestate, without wife or children in the life of the mother, every brother and sister, and the representatives of them, shall have an equal share with the mother.

In this case there is a wife left, but the intent of the act was to put the intestate's brothers and sisters, and their representatives, in the same light and condition with the mother; so that whenever the mother was intitled, the brothers and sisters, and their representatives (*per stirpes*), were to have an equal share with her, and cited the case of *Keilway* v. *Keilway*, 2 *Wms.* 344. (1), *Pasch.* 12 *Geo.* which was as follows: The plaintiff was the widow and administratrix of one that died intestate having no children, but left a mother, a brother and sister, and brother's children, and it was decreed the wife should have a moiety, and the other moiety equally to the mother, brother and sister, and brother's children, (as representatives of the father *per stirpem*), which case is exactly the same with the present in every circumstance, except that in the present case the intestate had no brother and sister living at his death, which is not material, in regard that the children of the brother take by way of representation.

It was insisted for the defendant, the intestate's mother, that these statutes are to receive a favourable construction to exclude representations in a remote degree, in respect of collaterals, agreeable to the case of *Carter* v. *Crawley*, *Raym.* 496. and that the words in the statute of *James* are in the conjunctive, and require a brother or sister to be *in esse*, as well as representatives of brothers and sisters to make a case within that statute.

It has been determined that when the *intestate* leaves brother's or sister's children, and no brother or sister, such children take *per capita*, as next of kin, and not by representation, *Eq. Cas. Abr.* 249. *Walsh* and *Walsh*; and that the construction of the statute was the same if a man died leaving aunts and nieces, and no brother or sister, such aunts and nieces would all take *per capita*, and the nieces could not take *per stirpes*; and yet if the father of the nieces had been living, he would have taken the whole, and this was determined in the case of *Durant* and *Prestwood*, *June* 30, 1738 (2).

Where an intestate leaves brothers or sisters children, and no brother or sister, they take *per capita* as next of kin, and not by representation: So if he died, leaving aunts and nieces, and no brother or sister, they would all take *per capita*; but if the father of the nieces had been living, he would have taken the whole.

[457]

And from hence it was argued, that as there was no brother or sister of the intestate living, if the plaintiffs in this case took any thing, it must be necessarily *per capita*, and not by representation; that when brother's children take *per capita*, they must necessarily take as next of kin, because, as they are not in equal

(1) 1 *Stra.* 710. S. C. *Gilb. Rep.* 189. S. C. 2 *Eq. Ab.* 441. S. C. *pl.* 47.

(2) *Ante* 454. S. C. See the cases in the notes.

degree

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degree with the inteſtate's mother, they could not otherwiſe take at all.

And it was further urged, that if they were intitled by repreſentation, it might be carried to the fourth or fifth generation, for there was nothing to reſtrain it in this act, as there was in the ſtatute of diſtributions, which would create great confuſion and fractions in the eſtates of *inteſtates*.

Lord Chancellor: There are two queſtions in this caſe.

Firſt, Whether the plaintiffs, who are the nephews and nieces of the inteſtate, ſhall ſhare with the inteſtate's mother, there being a widow of the inteſtate?

Secondly, Suppoſing they may ſhare, notwithſtanding that objection, whether they can come in, in reſpect that there is no *brother or ſiſter* of the inteſtate living?

The ſtatute of diſtributions, and the ſtatute of *Jac.* 2. very incorrectly penned, and therefore the latter is to be conſtrued according to the intent of the legiſlature.

As to the firſt, it is directly within the caſe of *Keilway* and *Keilway*, and I am ſatisfied with the reaſon of that caſe. It depends upon the conſtruction of the proviſo in the ſtatute of *James*, which is very incorrectly penned, and ſo is the ſtatute of diſtributions; and therefore a conſtruction is to be made upon the ſecond ſtatute, according to the intent and meaning of the legiſlature.

Upon the ſtatute of diſtributions, the deſcending line excluded all collaterals, and afterwards went to the next of kin; ſo that the father or mother would take all. As ſuppoſe a rich citizen died *inteſtate*, his ſhare would all go to the mother; therefore the ſubſequent ſtatute intended ſhe ſhould have a proviſion only equal with a brother and ſiſter of the inteſtate.

As to the ſecond queſtion, it is a new one; for the inteſtate has left no brother or ſiſter for the mother to collate, or ſhare equally with.

The caſe of *Walſh* v. *Walſh*, is grounded upon the ſtatute of *Car.* 2. *ſec.* 5. The words of the act do ſuppoſe that there muſt be ſome perſons to take in their own right, and others in right of repreſentation; but the ſtatute of *James* 2. is of a different kind, and lets in another perſon.

The word *and* in the 7th ſection of 1 *Jac.* 2. c. 17. immediately preceding the words *the repreſentives*, muſt be conſtrued in the disjunctive.

Here is a mother takes an original ſhare in her own right, and the brothers and ſiſters children take as if the brother and ſiſter were living; for the word *and*, immediately preceding the words *the repreſentatives*, muſt be conſtrued in the disjunctive.

The proviſo in the ſtatute of *James* is to be incorporated into the ſtatute of *Charles* where it ſays, that repreſentations ſhall not be carried beyond brothers and ſiſters children. The rule is, that ſtatutes made *pari materia* ſhall be conſtrued into one another.

As to the objection, that ſuch repreſentation might be carried to ſeveral generations, I think that conſequence does not follow, for the proviſo in the ſtatute of *James* is to be incorporated into the ſtatute of *Charles*, which expreſsly ſays, that repreſentations ſhall not be carried beyond brother's and ſiſter's children; and this is agreeable to the rule my Lord *Hale* lays down in 1 *Ventr.* that ſtatutes made *pari materia* ſhall be conſtrued into one another.

I think

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I think the statute of *James* intended to let in the rule of the civil law, which contained three lines, ascending, descending, and collateral; the descending line absolutely excluded all others, the ascending excluded all collaterals except brothers and sisters, and they took alike.

His Lordship therefore ordered the residue of the intestate's estate, after satisfaction of debts, to be divided into four equal parts, and two fourth parts thereof to be retained by the defendant *Phillippa* the intestate's widow, and one other fourth part to be paid to the defendant *Anne Stanley*, the intestate's mother, and the remaining fourth part to be laid out in *South-sea* annuities, in the name of the Accomptant general, subject to the order of this court, for the benefit of the plaintiffs the infants, equally to be divided (1).

(1) *Reg*, *Lib. B.* 1738. *fol.* 283.

(B) *Of Administration, to whom to be granted.*

Charles Humphrey, Administrator of the Goods un-administered of his Sister *Mary Scarlet*, Widow of *William Scarlet*, and formerly the Wife of *John Osborne*, deceased, ——	Plaintiff.	*May* the 18th, 1737.
Thomas Bullen, and *Anne* his Wife, Administratrix of the said *William Scarlet*, who was Administrator of the said *Mary Scarlet*. —	Defendants.	

Case 213. S. C. 2 Eq. Ca. Ab. [illegible] pl. [illegible] S. C. 11 Vin. Abr. 88. pl. 6.

A. Survives her first husband, who left her a legacy, and intermarries with *B*. She dies, the legacy being unreceived by *B* during her life, but after her death he took out administration to her, but died himself before the legacy came to his hands, and his administrator gets it in, and the administrator *de bonis non* of the wife brings his bill to have this legacy received by the administrator of the husband, paid over to him as the legal representative of the wife.

A. survives her first husband, who left her a legacy; she dies, the legacy being unreceived by the second husband during her life, but after her death he administers, and die before the legacy came to his hands; his administrator gets it in, and the administrator *de bonis non* of the wife brings this bill for the legacy.

Equity considers the administrator *de bonis non* as a trustee for the administrator of the husband, who having an absolute right by surviving his wife, his administrator ought to have the benefit of it (1).

During the coverture, husband and wife are but one person; but when she dies, he has a right to administer exclusive of all other persons.

(1) See *Cart* v. *Rees*, 2 *Eq. Ab.* 423. *Elliot* v. *Collier*, *post.* 3 vol. 526. 1 *Ves.* *pl* 7. 1 *P. W.* 381. S. C. cited. *Lady* 15. S. C. 1 *Wils.* 168. S. C. *[illegible]*'s case, 1 *P. W.* 382. cited.

Mr. At-

HUMPHREY v. BULLEN.

Mr. Attorney General for the plaintiff contended, that a husband and wife in law are but one person, and consequently no relation, nor intitled to administer.

[459] *Lord Chancellor:* During the coverture, they are but one person; but when that coverture is dissolved by the death of the wife, the husband is certainly the next friend and nearest relation, and has a right to administer exclusive of all other persons. At common law no person at all had a right to administer, but it was in the breast of the ordinary to grant it to whom he pleased, till the statute of the 21st of *Hen.* 8. which gave it to the next of kin; and if there were persons of equal kin, which ever took out administration was intitled to the surplus; and for this reason the statute of distribution was made, in order to prevent this injustice, and to oblige the administrator to distribute.

The question here is, Whether the administrator *de bonis non* of the wife, or the administrator of the husband, is intitled to this legacy?

I think clearly it was a vested interest in the husband, and therefore his administrator, as his representative, is intitled to it, without being obliged to make distribution; for the husband is not within the equity of the statute, and it is explained besides by the last clause in the statute of frauds and perjuries (1), *sec.* 25. "And for the explaining an act of this present parliament, *intituled*, An act for the better settling of intestates estates, be it declared, that neither the said act, nor any thing therein contained, shall be construed to extend to the estates of feme coverts that shall die intestate, but that their husbands may demand, and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act."

Notwithstanding by the rules of the common law the administrator of the wife is intitled to it, being a *chose in action*, not received or got in by the husband in his life-time, yet equity will consider such administrator as a trustee for the administrator of the husband, for the husband having an absolute right to it by surviving his wife, his administrator ought to have the benefit of it; and therefore the plaintiff's bringing this bill is a breach of trust, and I dismiss it with costs, and decreed accordingly. For the plaintiff was cited *Burnet* v. *Kynaston* *, and for the defendant *Huntley* v. *Griffith* †.

(1) 29 *Car.* 2. *c.* 3. *sec.* 25.

* *Prec. in Chan.* 118, and in 2 *Vern.* 401. † *Mo.* 452.

(C) *Of Remedies by one Executor or Administrator against another, and how far one shall be answerable for the other.*

November the 7th, 1737.

Case 214.

Hudson v. *Hudson.*

S. C. cited 2 Vef. 267.

The plaintiff and *W. H.* administrators to *J. H.* empower the defendants by letters of attorney to get in the intestate's effects in *Flanders*. *W. H.* afterwards settles the account with them, receives the balance, gives a general release, and then dies. The plaintiff, as surviving administrator, prays the stated account, and releases may be set aside, as being settled without his privity. One administrator cannot release a debt so as to bind his fellow, otherwise is to an executor, for each intirely represents the testator; but the release of one administrator may bar both, if releasee is accountable to them in their own right, and not as administrators. The releases here being unfairly obtained, though effectual in law, were set aside in equity.

JOHN Hudson dying intestate, and unmarried, letters of administration to him were granted to the plaintiff and one *William Hudson*, who prevailed on the plaintiff to join and execute several letters of attorney to the defendant *Benjamin Hudson*, then in *Flanders*, and also to another defendant *Joseph Hudson*, then in *London*, impowering them to get in the effects of the intestate. After the defendants had received some of the intestates estates and effects, *William Hudson*, joint administrator with the plaintiff, settles an account with the defendants, who were his sons, receives the balance, and gives them a general release, and then dies; afterwards the surviving administrator filed his bill to set aside the defendant's stated account and the releases, and to have satisfaction, suggesting that they ought not to bind him, being settled without his privity. The defendants, in their answer, insisted on their stated accounts and release; and the question was, If the release would bar the surviving administrator?

Lord Chancellor: There are two questions in this case which are merely matters of law.

First, Whether a release of a debt, or conveyance of a term by one administrator, will bind his companion where there is a joint administration granted?

Secondly, Whether the defendants acting, and collecting part of the estate under a letter of attorney from both the administrators, will vary the case?

As to the first point, I am of opinion that one administrator cannot release a debt, or convey an interest, so as to bind the other, and that the case of an administrator differs from that of an executor.

It is certain that executors have such a power, and the reason is, that each executor is considered as intirely representing the testator (1). If an action is brought against joint executors, who plead different pleas, some books say, that plea shall be received which is most for the benefit of the testator's effects, and this shews each executor may plead in right of his testator.

(1) See 2 *Bac. Ab.* 395.

But

HUDSON v. HUDSON. The interest of an executor arises not from the probate, but from the testator, therefore he may release a debt, or assign a term before probate.

But the case of executors differs essentially from that of administrators; executors receive all their power and interest from the testator, and though before they can maintain an action they must prove the will (1), yet the probate is only a declaration of the proper court that they are executors, which by the law of *Scotland* is called confirming the executors to the testator, and is the same in effect as is done here, and still the interest arises not from the probate, but from the testator; therefore an executor may release a debt, or assign a term before probate (2), and if after probate he sues for the same, the precedent act done by him may be pleaded in bar: if an executor appoints another to be his executor, and dies, he is immediate representative to the first testator, but on the death of an administrator, his whole interest determines, and administration *de bonis non, &c.* must be granted.

If a debtor be made executor, the debt is totally extinguished, otherwise if he be appointed administrator, for it is no extinguishment of the debt, but a suspension of the action, and his representative chargeable at the suit of the administrator *de bonis non, &c.* of the first intestate.

So if a creditor makes his debtor his executor, the debt is totally extinguished, and cannot be revived (3), though the executor should afterwards die intestate, and administration *de bonis non, &c.* of the first testator should be granted: but if a debtor be appointed administrator, that is no extinguishment of the debt, but a suspension of the action, and his representative on his death would be chargeable at the suit of the administrator *de bonis non, &c.* of the first intestate. *Salk.* 299. 8 *Co.* 135. These cases evince the different foundations on which the rights of executors and administrators depend, the power of the latter arising wholly from the ordinary, of the former from the testator.

The right of executors and administrators depends on different foundations, the latter arising from the ordinary; the former from the testator.

An administration properly defined, a private office of trust, being more than a bare authority, and yet less than the interest of an executor.

The right of an administrator is expressed so differently in the books, as if they were at a loss how to describe it. In 8 *Co.* 135. *b.* it is called an authority, because the administrator has nothing to his own use; in *Vaughan* 182. it is with greater propriety called a private office of trust, for it is more than a bare authority, and less than the interest of an executor, which seems to have been the foundation of Lord *Cowper's* opinion in 2 *Vern.* 514.

If therefore an administration be in the nature of an office, what will the consequence be in the present case? for if an office is granted to two, they must join in the executing the acts of the office, and one cannot act unless in the name of

(1) *Vide Wills* v. *Rich*, *post.* 2 vol. 285. note 1.

(2) *Dyer* 367. *a. pl.* 39. *Mead* v. *Lord Orrery*, *post.* 3 vol. 239.

(3) So *Wankford* v. *Wankford*, 1 *Salk.* 299. But it seems that the appointment of a debtor executor, is only parting with the *action*; but the executor is considered as a *trustee* for the money so owing to the testator, and such money in equity is considered as part of the testator's personal estate. *Holliday* v. *Boas*, 1 *Roll. Ab.* 920. *Askwith* v. *Chamberlain*, 1 *Cha. Rep.* 138. *Field* v. *Clark*, *ibid.* 242. *Fox* v. *Fox*, *post.* 463. *Carry* v. *Goodinge*, 3 *Bro. Cha. Rep.* 110.

both

both, and on this kind of reaſoning the preſent caſe will depend. — Hudson *v.* Hudson.

There has been no caſe cited except *Dyer* 339. and *Co.* 143. *b.* which turns on the repeal of letters of adminiſtration, but I have the opinion of a very great man, Lord *Bacon* in his *Elements*, 4*th vol. new edit.* *p.* 83. which ſeems to correſpond with mine as to the nature of the different rights of executors and adminiſtrators, therefore I think the releaſe of one adminiſtrator will not bar the other (1).

The next queſtion is of another conſideration, whether the defendants having acted under the letter of attorney of both adminiſtrators, and being therefore accountable to themſelves in their own right, and not as adminiſtrators, the releaſe of one may not bar both, and I think it may. [462]

The caſes conſider them as repreſenting the inteſtate, and ſuing in that right, where they muſt name themſelves adminiſtrators, and ſo ſays Lord *Bacon*; but here both adminiſtrators execute a letter of attorney, to impower the defendants to collect the effects, and receive the inteſtate's debts, and ſo far as they have acted under that authority, they are anſwerable to the adminiſtrators in their own right, and might be charged as their bailiffs and receivers, and they need not name themſelves adminiſtrators, and if nonſuited, they muſt pay coſts as ſuing *in jure proprio.*

A perſon acting under a letter of attorney from adminiſtrators may be ſued by them in their own right as a bailiff or receiver, and need not name themſelves adminiſtrators.

If there is a joint debt owing to two, and one releaſes, the action is gone, whether it ariſes on bond, or ſimple contract.

It has been ſaid, that ſome part of the inteſtate's eſtate has been received by the defendants in ſpecie, upon which the right of adminiſtration ſhould ſubſiſt; but I apprehend in ſuch caſe the releaſe of one adminiſtrator would be a bar, for thoſe things were in effect delivered to them by the adminiſtrators themſelves, for which they muſt ſue in their own right, and therefore the releaſe of one bars the other; for tho' in trover they may name themſelves adminiſtrators, yet they need not do it.

Tho' adminiſtrators in trover may name themſelves ſo, yet they need not do it, for they may ſue in their own right.

Then the queſtion is, What a court of equity will do with a releaſe that is effectual at Law? If it was unfair and colluſive, a court of equity ought to ſet it aſide, and upon the evidence here, the releaſes appearing to be unfairly obtained, were ſet aſide.

And as to the defendants *Benjamin* and *Joſeph Hudſon*, his Lordſhip declared that the plaintiff is not bound by the accounts ſtated, and the releaſes executed by their father, from demanding an account againſt them in a court of equity, and therefore an account was directed accordingly (2).

(1) But the Author of the Touchſtone makes a quære as to this point. See *Shep. Touch.* 484, 485. And the Maſter of the Rolls in *Jacob* v. *Harwood*, 2 *Veſ.* 265. ſaid, that it was held in a caſe of *Willard* v. *Fenn*, in B. R. that one adminiſtrator ſtood on the ſame ground and foundation with one executor.

(2) *Reg. Lib. A.* 1737. fol. 138.

Hudson v. Hudson. Where one administrator dies, the right survives without new letters of administration

N. B. When this case of *Hudson* v. *Hudson* came before Lord *Talbot*, on a plea of a stated account, and the release, he held, that if one administrator dies, the right of administration would survive without new letters of administration. *Vide* 2 *Vern.* 514 (1).

(1) But the Master of the Rolls in *Jacomb* v. *Harwood*, 2 *Vef.* 268. said, that the ecclesiastical court now holds it necessary in the case of two administrators to come back to them on *the death of one* for a probate.

[463]

(D) *What shall be Assets.*

Michaelmas Term, 1737.

Fox v. *Fox*.

Case 215. S. C. 2 Eq. Caf. Abr. 502. pl. 39. *A.* mortgaged his estate to *B.* who paid no money, but gave a bond for 130*l.* *A.* afterwards makes *F.* his executor. The debt not extinguished in equity.

A. Mortgaged his estate to the defendant, who paid no money in consideration of the mortgage, but gave *A.* a bond for 130*l.* *A.* afterwards makes the defendant his executor: The heir of *A.* brings his bill to have the real estate exonerated, considering this bond as assets in the hands of the defendant.

Lord Chancellor: Notwithstanding at common law the making an obligor executor extinguishes his debt, yet in this case the bond shall be considered as assets in the hand of the defendant the executor, and applied, after the payment of funeral expences and legacies, to the exoneration of the real estate in favour of the heir. (1).

(1) *Reg. Lib.* A. 1737. fol. 789. See *Hudson* v. *Hudson*, *ante* 461.

November 13th, 1738.

Nugent v. *Gifford* and Others.

Case 216. S. C. 2 Vef. 269. cited. An executor assigns over a mortgaged term of his testator to *A.* as a satisfaction of a debt due to *A.* from the executor, this is a good alienation, and *A.* shall have the benefit of it against the daughters of the testator, who were creditors under a marriage settlement (1).

THE bill was brought against some of the defendants, as trustees of a mortgage term for an assignment, and against others to discover what interest they had in the premisses.

It appeared that the mortgage in question, was a mortgage term to trustees in trust for Sir *Richard Billings* the testator, and Mr. *Arundel* executor of Sir *Richard* had assigned this mortgage term to the plaintiff, as a satisfaction for a debt due from Mr. *Arundel* to the plaintiff.

(1) The authority of *Nugent* v. *Gifford*, seems confirmed by the following cases, *Ewer* v. *Corbet*, 2 *P. W.* 148. *Elliot* v. *Merriman*, *post.* 2 vol. 41. *Mead* v. *Lord Orrery*, *post.* 3 vol. 235. *Ithel* v. *Beane*, 1 *Vef.* 215. *Jacomb* v. *Harwood*, 2 *Vef.* 265. *Bonny* v. *Ridgard*, 2 *Bro. Cha. Rep.* 438. 4 *Bro. Cha. Rep.* 130, cited. *Whale* v. *Booth*, 4 *Durn. & East*, 625. (note). *Andrew* v. *Wrigley*, 4 *Bro. Cha. Rep.* 125. See also *Langley* v. *Oxford*, *Amb.* 17.

The

The question was, If such assignment was good against the daughters of Sir *Richard Billings*, who were creditors under the marriage settlement, and also to whom the trustees should assign the legal estate.

NUGENT v. GIFFORD.

Lord Chancellor: The question is, If the two daughters, who are allowed to be creditors, are intitled to follow this mortgage term (in the hands of the plaintiff as assignee of it) as specifick assets.

I am of opinion they are not, but that the plaintiff is intitled to the benefit of such assignment by the executor.

At law the executor has a power to dispose of, and alien the assets of the testator (1), and when they are aliened, no creditor by law can follow them, for the demand of a creditor is only a personal demand against the executor, in respect of the assets come to his hands, but no lien on the assets: This court will indeed * follow assets upon voluntary alienations by collusion of the executor (2); but if the alienation is for *a valuable consideration*, unless fraud is proved, this court suffers it as well as at law, and will not controul it; for a purchaser from an executor, has no power of knowing the debts of the testator; and if this court, upon the appearance of debts afterwards, would controul such purchasers, no body would venture to deal with executors.

At law an executor may alien the assets of a testator, and when aliened, no creditor can follow them, and wh[en] the alienation is for a valuable consideration, this court suffers it as well as at law.

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* *It is objected first*, That these were the equitable assets of Sir *Richard Billings*, and that the plaintiff purchased nothing but an equitable interest, burthened with all the equity in the hands of the person from whom he purchased (3).

But that is a rule only where there is a lien on the thing itself, and I know no difference in this court, between the power of an executor to dispose of equitable and legal assets.

No difference in this court between the power of an executor to dispose of equitable and legal assets.

The *second objection* is, That the assignee took this assignment with notice, that it was the testamentary assets of Sir *Richard Billings*.

But if this was sufficient to affect it, it would affect every purchase from an executor, because every such purchaser must have such notice.

The *third objection* is, That this is a *devastavit*, because the consideration was a debt of the executor's own.

But I know no rule in this court to warrant *that*, neither is there any difference between this and money paid down, provided it be done *bonâ fide*, a sum of money *bonâ fide* due (4), is as good and valuable a consideration as any.

An assignment by an executor of a testator's assets to a person who has a sum of money *bonâ fide* due, is as valuable a consideration as for money paid down.

(1) But it seems, that a testator's goods cannot be taken under an *execution* for a debt of the executor. See *Farr* v. *Newman*, 4 *Durn. & East*. 621.

(2) *Crane* v. *Drake*, 2 *Vern*. 616. *Taner* v. *Ivie*, 2 *Vef*. 469, and see the cases cited *supra* in note.

(3) See *Scot* v. *Tyler*, 2 *Bro. Cha. Rep.* 431. where the question, whether an *equitable* assignment of a specific legacy by an executor for his own private debt, was binding, was much agitated. But that point ended in a compromise.

(4) *Vide Hodgson* v. *Dand*, 3 *Bro. Cha. Rep.* 475.

Nugent v. Gifford.

The only authorities relied on are *Crane* v. *Drake*, 2 *Vern.* 616. and *Paget* v. *Hoskins*, *Prec. in Eq.* 431. (1) the first greatly differs from the present case, there being express notice of a debt from the testator, still unsatisfied, and a contrivance between the purchaser and the executor, to defeat a just debt, and as *Lord Chancellor* said, the defendant was a party to, and contriving a *devastavit* (2).

Here was no notice of any debts due from the testator, for it is sworn in the answer, that Sir *Richard Billings* died worth 40,000 *l.* and this was a debt under a settlement, which is a private transaction in the family.

As to the case of *Paget* v. *Hoskins*, that was a gross sum computed by the wife as her share of her former husband's estate, according to the custom of *London*, and taken by the husband, subject to that account (3).

These are the only authorities, and both different from the present case; this I think therefore is a good alienation, and the plaintiff ought to have the benefit of it. (4).

(1) *Gilb. Rep.* 111. S. C.

(2) His Lordship according to a MSS. report of *Nugent* v. *Gifford*, observed, that the purchaser in *Crane* v. *Drake*, admitted notice of the plaintiff's debt by his answer; it was so stated in the decree, and the determination was right.

(3) In the above noticed MSS. report his Lordship said, that *Paget* v. *Hoskins* was a clear case, and he wondered my Lord *Harcourt* should vary his first decree.

(4) *Reg. Lib. B.* 1738. *fol.* 117. See the Master of the Rolls's observations on this case in *Andrews* v. *Wrigley*, 4 *Bro. Cha. Rep.* 136.

[465] *November* the 30th, 1739. At the Rolls.

John Hinton and Others, Creditors of *Edward Toye*, — Plaintiffs.

Henry Toye, *William Broughton* the elder, *William Broughton* the younger, *Sarah Broughton*, and *Anne Broughton*, — Defendants.

Case 217.

Before the marriage of *Edward Toye* with *Mary Broughton*, it was agreed that 300 *l.* till it could be laid out in the purchase of lands, should be settled in trust for *Edward Toye* for life, for *Mary Broughton* for life, and in default of issue, to the use of such person, and for such estate as she should by any deed direct or appoint, and for want of such appointment, to her right heirs forever.

Mary by deed poll appoints the 300 *l.* to be paid to her husband, to be employed by him to such charitable uses, or other intents and purposes as he should think fit.

Edward Toye by will devises to the defendants *William*, *Sarah*, and *Anne Broughton*, 100 *l.* a-piece, being the money charged on the estate of his wife's father, and declared in his will that such disposition was in pursuance of the directions.

The creditors of *Edward Toye* bring their bill to have the 300 *l.* applied to the payment of his debts, as a part of his assets.

This is not a naked power only to convey to charitable uses, but ought to be considered as a part of the assets of *Edward Toye*, and applied in payment of his debts (1).

BY articles of agreement dated the 20th of *April* 1723, before the marriage of *Edward Toye* with *Mary Broughton*, it was declared and agreed that 300 *l.* part of 450 *l.* charged upon an

(1) So *Thompson* v. *Towne*, *Pre. Cha.* 52. 2 *Vern.* 319. S. C. *Lassels* v. *Lord*

an eftate of Doctor *Broughton*, and devifed by him to the faid *Mary* his daughter, fhould remain a charge upon the land, till it could be laid out in the purchafe of lands of inheritance, which fhould be fettled in truft for *Edward Tye* for life, and after his deceafe, in truft for *Mary Broughton* for life, in augmentation of her jointure, with other limitations for the benefit of the younger children of *Edward* and *Mary*, and for want of fuch iffue, to the ufe of fuch perfon and perfons, and for fuch eftates as the faid *Mary Broughton*, the younger, fhould by any deed in writing direct or appoint, and for want of fuch direction, to the right heirs of *Mary Broughton* for ever. HINTON v. TOYE.

After marriage, *Mary* the wife of *Edward Tye*, by deed poll dated the 4th of *May* 1736, did appoint the 300*l.* to be paid to her hufband the faid *Edward Tye*, *to be employed by him to fuch charitable ufes, or other purpofes and intents as he fhould think fit.*

Edward Tye, there being no iffue of the marriage, by his will, after other bequefts, devifes to the defendants, *William Broughton* the younger, *Sarah Broughton*, and *Anne Broughton*, one hundred pounds a-piece, being the money charged on the eftate of *William Broughton* his brother-in-law, and fettled on the teftator by his late wife, and declared in his will, that fuch difpofition was in purfuance of the direction of his dear wife.

On the 10th of *Nov.* 1736, *Edward Tye* died, leaving *Henry Tye* his only fon and heir; the devifees of the 300*l.* are the three children of a poor clergyman unprovided for, and brother to *Mary* the wife of the teftator.

The creditors of *Edward Tye* brought this bill to have the three hundred pounds applied to the payment of his debts, as a part of his affets. [466]

The defendants infifted that *Edward Tye* had only a naked power to convey this fum to fome charitable ufes, purfuant to the appointment of the wife, and that the will fhall be taken as an execution of fuch power, and is a difpofition to a charity according to that appointment, and not liable to pay the teftator's debts.

Mafter of the Rolls (a): The queftion is, Whether *Mary* the wife of *Edward Tye*, confidered him as a truftee of the 300*l.* and a bare inftrument to convey to other perfons, or whether he had the *ownerfhip*? If it be his own property, certainly no act of his could difpofe of a creditor's right: if a man has the ufe of a thing, (and he plainly was intitled to it for his life in all events), and the power of giving it to whom he pleafes, he is undoubtedly the owner of it, which power *Edward Tye* very plainly had. for there are but three ways of property, enjoying in one's own right, transferring that right to another, and the right of reprefentation; here it is given to be employed in fuch purpofes as the hufband fhall think fit; can there be any purpofe in the world but he may employ it in?

(a) Mr. *Verney*. There are only three ways of property, enjoying in one's own right, transferring that right to another, and the right of prefentation.

Lord Cornwall's, *Pre. Cha.* 272. 2 *Vern.* 287. *Townfend* v. *Windham*, 2 *Vef.* 1. 405. S. C. *Afhfield* v. *Afhfield*, 2 *Vern.* *Bainton* v. *Ward*, *poft.* 2 vol. 172.

HINTON v. TOYE.

The only doubt is upon the words, *charitable uses*, and indeed they do intimate that the wife had some wish, that her husband would so employ the 300 *l.* or at least *recommended* it to him to dispose of it to charity (1) but has not tied him down to it, for the latter words leave it absolutely to his discretion, to dispose of it *to any purposes or intents, as he shall think fit.*

In the case of *Lassels* v. *Lord Cornwallis*, *Prec. in Chan.* 232. A. *on his marriage creates a term in trust to raise* 6000 l. *of which* 3000 l. *was for his younger children, and the other* 3000 l. *as he should appoint, after he appoints the* 3000 l. *as a collateral security to* J. S. *and by will devises it and the other* 3000 l. *to his daughter, and yet held, that it should be assets to satisfy a bond creditor.*

A man cannot by an expression in his will alter the nature of his estate, and disappoint his creditors.

In the case now before me, there is the same uncontrouled power as in the other, nor does there want any precedent act to make this exist in the husband, for the money is actually directed to be paid into his hands; could he not therefore have laid it out on a mortgage, or lent it upon a bond, or even thrown it into the sea? So that no stronger instance can be given, than the present, to prove ownership and property; and though he says indeed in his will, it was *in pursuance of the direction of his dear wife*, yet a man cannot by any expression in his will alter the nature of his estate, and disappoint his creditors who have no occasion to resort to his will, but claim by an interest precedent *viz.* the deed of appointment by his wife, whereby they shew that their right commences from the wife's execution of the power given her by the marriage articles.

No instance of a construction in favour of legatees to the prejudice of creditors, unless the creditors found their right under the will itself.

There is no instance in this court of a construction in favour of legatees to the prejudice of creditors, unless the creditors *found their right under the will itself, which they do not in the present case.

[*467] His Honour therefore declared, *that the* 300 l. *is to be considered as part of the testator's assets, and ought to be applied in payment of his debts, and decreed the real and personal estate to go in payment of his debts, and if sufficient, then to pay the legacies, if not sufficient, the legatees to abate*, except as to the three legacies of 100 *l.* each to *William*, *Sarah*, and *Anne Broughton*, which are to be paid them preferably to the other legacies (2).

(1) *Cunliffe* v. *Cunliffe*, *Amb.* 686. See *Harding* v. *Glyn*, *post.* 470. note 1.

(2) *Reg. Lib. A.* 1739. fol. 145.

February the 26th, 1736.

Case 218.

S. C. post, 2 vol 54. 383.

Partridge v. *Pawlet* (1).

Rule where a husband is left sole executor.

IN this case *Lord Chancellor* laid down the following rules.

Where a husband is left sole executor, he is intitled to the surplus, and it shall not be construed as a resulting trust.

If

(1) It seems necessary to state this case shortly from the Register's book. *John Ward* devised lands (after certain limitations which were determined) to his two

If two tenants in common put out money as joint executors, it shall not survive, but shall go respectively to those persons who are the proper representatives of each.

PARTRIDGE *v.* PAWLET. Rule as to survivorship.

A devise of the rents and profits of an estate to the husband for life, without impeachment of waste, shall not considered

Rule upon a devise for life, without impeachment of waste.

two daughters *Elizabeth* and *Sarah* in fee, as tenants in common; and gave them 2000 *l.* equally between them to be raised by the sale of timber. He appointed *Sarah* and *Elizabeth* executrixes and residuary legatees, and died. *Mary Ward* by her will bequeaths the residue of her personal estate to her two sisters the said *Sarah* and *Elizabeth*, appoints them executrixes, and dies. *Sarah*, being thus intitled to a considerable personal estate, (tho' the same was not actually in her possession) and to the moiety of a real estate, upon her marriage with the plaintiff *Partridge* agreed to pay him 5300 *l.* in consideration whereof he, by indenture dated the 2d of *June* 1736, settled certain lands upon her and her issue. Previous to the marriage, *Sarah* by indenture *bearing even date with the last mentioned indenture* reserved to herself the power of disposing of all her real and personal estate (except the said 5300 *l.*) *Sarah* and *Elizabeth* had at different times placed out part of the monies, which they were entitled to as aforesaid upon *mortgages*. *Sarah* by virtue of her power devises her real estate to trustees in trust for her children and in default of such issue *the rents and profits to be to the use of the plaintiff her husband for life sans waste*. She appointed him *sole executor* and died without issue. The plaintiff now brought his bill; when his lordship directed the master to take an account of the personal estate of *John Ward* deceased, a moiety whereof, after payment of debts, *&c.* was to be considered as the personal estate of the plaintiff's late wife *Sarah*; and also to take an account of the personal estate of *Mary Ward* deceased, and as to so much thereof as was received in the life-time of said *Sarah*, the master was to see *whether any act was done to sever the jointenancy of such part*, and such part as was received by *Sarah* in her life-time was to be a debt upon her estate, and the plaintiff was to account for what he had received. The master was also to take an account of the personal estate of *Sarah*, and to see, whether said 5300 *l.* had been paid to the plaintiff, and so much as appeared due for said 5300 *l.* and *the surplus of her personal estate* (after payment of debts, *&c.*) was to be paid to the plaintiff. The defendants were to account for the rents and profits of the real estate devised to the plaintiff for life, and those rents and profits were to be applied in the first place *to keep down the interest of the surplus of Sarah's debts*, and the residue to the plaintiff. The plaintiff was to hold the premises devised to him, according to his wife's will, subject to the order of the court, *but not to fell timber without leave of the court*, unless for necessary repairs and boots. *Reg. Lib. B.* 1736. fol. 223. The master now made his report, whereby he reported, that part of the personal estate of *Mary Ward* (after certain payments) had been received by and divided between *Sarah* and *Elizabeth* in the life-time of the former: that the plaintiff received 847 *l.* on *Cutfield*'s mortgage, who, with his wife gave the defendants a note promising to be accountable to them for one moiety thereof with interest from the receipt until they had made over their shares in *Newland*'s and *Crowther*'s securities: that it did not appear such shares were ever made over: that no act (except as aforesaid) was done to sever the joint-tenancy of such parts of said personal estate as were received by *Sarah* in her life-time: but plaintiff insists that such jointenancy was severed *by the deed of the 2d of June* 1730. (note it does not appear by the Register's book what the contents of this deed were, except as before stated). His Lordship declared, that the joint-tenancy as to *Mary Ward*'s personal estate was *not severed, except as to Cutfeild's, Newland's*, and *Crowther*'s mortgages, which he decreed to be equally divided between the plaintiff and the defendant and his wife. *Reg. Lib. B.* 1739. fol. 461.

PARTRIDGE v. PAWLET.

as annual profits only, but will empower him to cut timber (1).

Rule as to payment of interest.

Tenant for life pays one third of interest upon debts and legacies, and reversioner two thirds (2).

(1) See the case and Co. Lit. . b.

(2) This conclusion is neither warranted by the above case, nor by the general rule in cases of this kind. See *Savile* v. *Savile*, *post.* 2 vol. 462. *Bridgman* v. *Dove*, *post.* 3 vol. 201. *Rivet* v. *Watkins*, 1 *Ves.* 93. *Amesbury* v. *Brown*, 1 *Ves.* 4 .0. *Tracy* v. *Hereford*, 2 *Bro Cha. Rep.* 128. See *post.* 2 vol. 416. note 1.

Vide title *Assets*.

(E) *Rule where a Bill is brought against an Executor of an Executor.*

Michaelmas term, 1739.

Case 219.

Huet v. *Fletcher*.

The plaintiff's father died intestate, the mother administred, 40 years after the father's death, the son who had accepted of a legacy under the mother's will, equal to two thirds of what his father left, brings this bill against the mother's executor, to account for the father's personal estate come to her hands.

To deter others from such frivolous suits, his Lordship dismissed the bill with costs.

THE father of the plaintiff dies intestate, the mother possesses herself of all his personal estate, the son acquiesced for 40 years after the death of his father, and upon the mother's dying, accepts of a legacy under her will, in value at least equal to two thirds of what his father left, and was contented for some time, but brings his bill now against the executor of the mother to account for all the personal estate of the father which came to her hands.

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Lord Chancellor: These are a sort of bills that deserve the utmost discouragement from this court, to oblige an executor to account for a personal estate, which, through the great length of time, he is utterly incapable of doing, besides too, a personal estate of a third person, and that did not belong to his testatrix, and where the plaintiff himself has also accepted of a legacy under the will of his mother, and acquiesced for a considerable time, and therefore to deter others from such frivolous and vexatious suits, I will dismiss the bill with costs.

After Hilary term, 1736.

Case 220.

Jefferies v. *Harrison*, Executor of Sir *Thomas Travel*.

The rule in relation to costs to be paid by an executor defendant is the same in the Court of Chancery as at law.

LORD *Chancellor* said in this cause, that when an executor is defendant at law, and fails in his defence, the rule is, that he must pay costs *de bonis testatoris, si non de bonis pro-*

priis;

prils; and as in this case the executor has misbehaved himself, by paying simple contract debts, preferable to a bond creditor, with notice, the court of chancery have no occasion to vary it from the common course. Jeffreies v. Harrison.

Vide title *Jointenants*.

Vide title *Bonds and Obligations*.

Vide title *Creditor and Debtor*.

Vide title *Bankrupt*.

CAP XLVII.

[469]

Exposition of Words.

Harding v. *Glyn*.

June the 7th, 1739.

Case 221.

N. H. by will gives to *Elizabeth* his wife all his estate, leases and interest *in his house in Hatton Garden*, and all the goods and furniture therein at the time of his death, and, also all his plate, jewels, &c. *but desired her, at or before her death, to give such leases, &c. unto such of his own relations as she should think most deserving.*

NICHOLAS *Harding* in 1701 made his will, and thereby gave "To *Elizabeth* his wife all his estate, leases, and "interest in his house in *Hatton Garden*, and all the goods, "furniture, and chattels therein at the time of his death, and "also all his plate, linen, jewels, and other wearing apparel, "*but did desire her at or before her death, to give such leases,* "*house, furniture, goods and chattels, plate and jewels, unto and* "*amongst* such of his own relations, *as she should think most* "*deserving and approve of*," and made his wife executrix, and died the 23d of *January* 1736, without issue.

Elizabeth, by her will, gave all her estate and interest to *H. S.* in the said house in *Hatton Garden*, and after several legacies, the residue of her personal estate to the defendant and two other persons, and made them executors; but neither gave, at or before her death, the goods in the said house, or her husband's jewels to his relations.

The Master of the Rolls was of opinion that *Elizabeth*, under the will of *N. H.* took only beneficially during her life, and that so much of the household goods in *Hatton Garden*, not disposed of by her according to the power given her by the will of *N. H.* in case the same remains in specie, or the value thereof, ought to be divided equally among such of the relations as were his next of kin at the time of her death (1).

(1) So in the following cases, the word *relations* or *kindred* in a will (without any specification of what relation or kindred) was confined to such as were within the statute of distributions. *Car* v. *Bedford*, 2 *Cha. Rep.* 146. *Griffith* v. *Jones*, 2 *Cha Rep.* 354. *Roach* v. *Hammond*, *Prec. Cha.* 401. *Thomas* v. *Hole*, *Ca. Temp. Talb* 251. *Anon.* 1 *P. W.* 327. *Whithorne* v. *Harris*, 2 *Ves.* 527. *Edge* v. *Salisbury*, *Amb.* 70. *Brunsden* v. *Woolredge*, *Amb.* 507. *Isaac* v. *Defriez*, *Amb.* 595. *Widmore* v. *Woodroffe*, *Amb.* 636. *Green* v. *Howard*, 1 *Bro. Cha. Rep.* 31. *Crossley* v. *Clare*, *Amb.* 397. *Phillips* v. *Garth*, 3 *Bro. Cha. Rep.* 64. *Rayner* v. *Mowbray*, 3 *Bro. Cha. Rep.* 234. *contra Jones* v. *Beale*, 2 *Vern.* 381. *Bennet* v. *Honywood* *Amb.* 708. But notwithstanding the above construction, yet the *shares* and *proportions* of such relations and kindred must be regulated according to the intent and construction of the *will* under which they claim, and not according to the statute of distributions; as particularly appears by the above cited cases of *Car* v. *Bedford*, *Thomas* v. *Hole*, *Brunsden* v. *Woolredge*, and *Phillips* v. *Garth*. *Butler* v. *Stratton*, 3 *Bro. Cha. Rep.* 367.

Elizabeth

HARDING v. GLYN.

Elizabeth his widow made her will on the 12th of *June* 1737, "and thereby gave all her estate, right, title, and interest to *Henry Swindell* in the house in *Hatton Garden*, which "her husband had bequeathed to her in manner aforesaid; and "after giving several legacies, bequeathed the residue of her "personal estate to the defendant *Glyn* and two other persons, "and made them executors," and soon after died, without having given at or before her death the goods in the said house, or without having disposed of any of her husband's jewels to his relations.

The plaintiffs insisting that *Elizabeth Harding* had no property in the said furniture and jewels but for life, with a limited power of disposing of the same to her husband's relations, which she has not done, brought their bill in order that they might be distributed amongst his relations, according to the rule of distribution of intestates effects.

Master of the Rolls: The first question is, If this is vested absolutely in the wife? And the second, If it is to be considered as undisposed of, after her death, who are intitled to it?

As to the first, it is clear the wife was intended to take only beneficially during her life; there are no technical words in a will, but the manifest intent of the testator is to take place, and the words *willing* or *desiring* have been frequently construed to amount to a trust, *Eacles & ux.* v. *England & ux.* 2 *Vern* 466. and the only doubt arises upon the persons who are to take after her.

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The words *willing* or *desiring* in a will have been frequently construed to amount to a trust (1).

Where the uncertainty is such, that it is impossible for the court to determine what persons are meant, it is very strong for

Where the uncertainty is such that the court cannot possibly determine who are meant in a will, it may be construed only as a recommendation to the first devisee, and make it an absolute gift to him. Where there is a devise to *relations* in a will, the statute of distributions is a good rule to go by, in construing who are meant by that word.

(1) It seems, that any words of a testator intimating a *request*, *wish*, *desire*, *recommendation*, &c. are sufficient to create a *trust*; provided there be *certainty* of the *gift*, and of the *object* to be benefited thereby. *Brest* v. *Offley*, 1 *Cha. Rep.* 246. *Parry* v. *Juxon*, 3 *Cha. Rep.* 38. *Eales* v. *England*, *Prec. Cha.* 200. 2 *Vern.* 466. S. C. 1 *Eq. Ab.* 297. *pl.* 3. S. C. *Clowdsley* v. *Pelham*, 1 *Vern.* 411. *Jones* v. *Nabbs*, 1 *Eq. Ab.* 404. *pl.* 3. *Richardson* v. *Chapman*, 1 *Burn. Ecl. Law*, 225. *Vernon* v. *Vernon*, *Amb.* 3. 2 *Bro. Cha. Rep.* 227. S. C. cited. *Clifton* v. *Lombe*, *Amb.* 519. *Massey* v. *Sherman*, *Amb.* 520. *Nowlan* v. *Nelligan*, 1 *Bro. Cha. Rep.* 489. *Pierson* v. *Garnet*, 2 *Bro. Cha. Rep.* 38. 226. *Finch*, *Pre. Cha.* 200. in note S. C. *Lewis* v. *King*, 2 *Bro. Cha. Rep.* 600. *But secus* where the *gift* or the *object* appears to be *uncertain*. *Palmer* v. *Scribb*, 2 *Eq. Ab.* 291. *pl* 9. *Buggins* v. *Yeates* 9 *Mod.* 122. *Harding* v. *Glyn*, *supra per Lord Hardwicke*. *Le Maitre* v. *Bannister*, 2 *Bro. Cha. Rep.* 40. *cited*, *Finch Prec. Cha.* 201. S. C. *Bland* v. *Bland*, 2 *Bro. Cha. Rep.* 43. cited *Finch Prec. Cha.* 201. S. C. *Harland* v. *Trigg*, 1 *Bro. Cha. Rep.* 142. *Wynne* v. *Hawkins*, 1 *Bro. Cha. Rep.* 180. *Sprange* v. *Barnard*, 2 *Bro. Cha. Rep.* 585. The case of *Cunliffe* v. *Cunliffe*, *Amb.* 686. *Finch Prec. Cha.* 201. S. C. 2 *Bro. Cha. Rep.* 42. S. C. which was determined contrary to the first of the above positions, was over-ruled by the master of the Rolls in the case of *Garnet* v. *Pierson*, *cited supra*. See 2 *Bro. Cha. Rep.* 46. *Hill* v. *the Bishop of London*, *post*. 620.

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the court to construe it only as a recommendation to the first devisee, and make it absolute as to him; but here the word *relations* is a legal description, and this is a devise to such *relations*, and operates as a trust in the wife, by way of power of naming and apportioning, and her non-performance of the power shall not make the devise void, but the power shall devolve on the court; and though this is not to pass by virtue of the statute of distributions, yet that is a good rule for the court to go by. And therefore I think it ought to be divided among such of the relations of the testator *Nicholas Harding*, who were his next of kin at her death; and do order, that so much of the said houshold good in *Hatton Garden*, and other personal estate of the said testator *Nicholas Harding*, devised by his will to the said *Elizabeth Harding* his wife, which she did not dispose of according to the power given her thereby, in case the same remains in specie, or the value thereof, be delivered to the next of kin of the said testator *Nicholas Harding*, to be divided equally amongst them, to take place from the time of the death of the said *Elizabeth Harding*. HARDING v. GLYN.

Leeke v. *Bennett*.

February the 20th, 1737.

Case 222.

Sir *J. L.* gives, by a codicil to his will, to *E. M.* during her natural life, his house in *Greenwich*, *with* all the houshold goods that shall be found therein at the time of his decease.
The word *with* so conjoins the devise of the house and houshold goods, that the devisee can have no larger interest in the latter, than was expressly limited as to the former.
The word *with* would have had the same effect in the case of a grant.

SIR *John Leeke*, by his will, devises in these words: "I "give to my nieces *Elizabeth Martin* and *Hannah Martin*, "or which shall be living at the time of my death, all my "houshold goods (particularly mentioned) in my house at "*Maze-Hill*, *Greenwich*."

By a codicil afterwards he says, "I give to my niece *Elizabeth Martin*, during the time of her natural life, my "house on *Maze-Hill* in *Greenwich*, *with* all the houshold "goods that shall be found therein at the time of my de- "cease."

There were only ten years to come in the house; both the nieces were living at the time of the testator's death, but the defendant survived the other. Part of the goods given in the codicil were excepted in the will, as gilt hangings, and some other things, and an additional 100*l.* a year given to his niece *Elizabeth Martin*, now *Bennet*, by the codicil, and then he devises as before mentioned. [471]

Lord Chancellor: The question is, Whether this be an absolute devise to *Elizabeth*, or for life only?

The first consideration is, what she would have taken under the will.

It is plain the nieces would have taken as jointenants, and only the particular goods so bequeathed, for the goods ex-

Leeke v. Bennet.

cepted they could not, though in the house at *Greenwich*; and the survivor would have taken the whole.

The codicil has made a total alteration in two respects; instead of a joint interest, it is made a sole interest, instead of an absolute property, an interest for life; and *Elizabeth* likewise takes the goods excepted, and consequently it is a revocation of the will, and an entire new bequest. If the codicil had stood alone, it would have been plainly a gift of the goods for life only; and the word *with* being made use of, it so conjoins the devise of the house and houshold goods, that the devisee can have no larger interest in the houshold goods, than was expresly limited as to the house (1). If the words *during her natural life* had been subjoined to the devise of the house, it had not been so clear a case, though I think that would not have varied the law of the case neither; but those words being put before the devise, must operate equally on both parts of the subsequent devise, and the same interest pass in both. The word *with* would have had the same effect, and been construed in the same manner in the case of *a grant*.

His Lordship took notice of a case in 1 *Roll's Abr.* 844. *letter M. No.* 2. If a man devises *Blackacre* to one in tail, and *also Whiteacre*, the devisee shall have an estate tail in *Whiteacre* likewise, for this is all one sentence, and consequently the words that make the limitation of the estate go to both. *Trin.* 40 *Eliz. B. R.* He cited too the case of *Cole* v. *Rawlinson**, where the word *also* had the like effect, and the same construction put upon it.

*Salk. 234.

Mr. *Fazakerley*, who was of counsel for the plaintiff, insisted upon the defendant's giving security for the goods, as the court had determined she had only an interest for life.

Lord Chancellor said he never knew it done, and therefore would not oblige the defendant to do it in this case, but directed an inventory to be made by the defendant *Bennet*, and signed by him and his wife, and to be delivered to the plaintiff.

A tenant for life of goods is not obliged to give security for the goods, but to sign an inventory only to the person in remainder (2)

(1) Vide *Richards* v. *Baker*, *post.* 2 vol. 321. (2) *Bill* v. *Kynaston*, *post.* 2 vol. 82. 321.

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May the 18th, 1737.

Champion v. *Pickax*.

Case 223.

A. devises several leasehold estates to two trustees, in trust; if his granddaughter married without their consent, to convey the premisses to two other trustees, in trust for her separate use during her life, and after her death for the use and benefit of her issue. Though she has no children by the first husband, she has only a right for her life, for the issue by any husband are provided for by this settlement.

HENRY *Pierce*, by his will, devised several leasehold estates to two trustees, in trust to assign them to his granddaughter *Mary Pigott*, at her age of 21 years, or marriage, if she married with the consent of them, or the survivor of them;

them; but if she married without such consent, then they were to convey the premisses to two other trustees and their heirs, in trust for the sole use and benefit of the said *Mary Piggott*, exclusive of any power and controul of her husband, for and during the term of her natural life, and after her decease, *for the use and benefit of her issue*. She married without the consent of the trustees, and they, in pursuance of the power in the will, conveyed the premisses to two other trustees, in trust for her during her natural life, and after her decease, for the use and benefit *of all and every her child and children*. CHAMPION *v.* PICKAX.

Her first husband died, and had no issue by her; she married the present plaintiff, and they brought their bill against the defendant, who was the surviving executor of the surviving trustee, to have him join in a sale of the trust estate, suggesting that the intent of the will was, for providing for the issue by the first husband only, and he dying without issue, she had now an absolute right and title to the premisses.

It was decreed she had *only* a right for her life, for she might have issue by any husband, who are provided for by the settlement, and would take by purchase.

The bill dismissed.

Vide title *Devises.*

Vide title *Remainder.*

Vide title *Jointenancy.*

Vide title, *Devise, under the Division, What Words will pass a Fee in a Will.*

Vide title *Bankrupt, under the Division, Rule as to Assignees.*

Primrose *v.* Bromley.

Vide title *Dower and Jointure.* Glover *v.* Bates.

CAP. XLVIII.

Extent of the Crown.

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Ex parte Marshal and others. March the 28th. 1751

Vide title *Bankrupt, under the Division, Rule as to an Extent of the Crown.*

CAP. XLIX.

Fines and Recoveries.

(A) *What Estate or Interest may be barred or transferred by a Fine or Recovery.*

(B) *What Estate or Interest is not barred by a Fine or Recovery.*

(A) *What Estate or Interest may be barred or transferred by a Fine or Recovery.*

May the 1[illegible]th, 1739.

Case 224.

S. C. Ca. Temp. Talb. 163.

Rolinson v. *Cuming.*

THE limitation in a will was to *C.* and his heirs, to the use of him and his heirs, in trust to pay debts, and after in trust for *D.* and the heirs of his body, and in default of heirs of the body of *D.* remainder to *C.* and his heirs, on condition he married *M.*

A limitation in a will to *C.* and his heirs, to the use of him and his heirs, in trust to pay debts, and after in trust for *D.* and the heirs of his body, and in default of the heirs of the body of *D.* remainder to *C.* and his heirs.

The recovery of *D.* barred the remainder to *C.* as being a remainder of *the trust*, for a remainder of a legal estate cannot be barred by the recovery of a *cestui que trust.*

D. suffers a recovery, and the question was, Whether this recovery barred the remainder to *C.*?

Lord Chancellor: The question depends upon this point, Whether the remainder to *C.* be a remainder of a legal estate, or of a trust? For a remainder of a legal estate cannot be barred by a recovery of *cestui que trust* (1), but all the remainders of the trust are (2).

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It has been said, that it is impossible for a man to be a trustee for himself; but that is not the point here, for as the legal estate and use is wholly in *C.* by virtue of the first part of the devise, the remainder cannot be in him, for that is part of the estate he had before, and unless the testator had given *C.* the remainder of the trust, it would have resulted to his heirs at law: he has therefore given him an interest distinct from either the legal estate or the use, which is the remainder of the trust, and he has given him that *on a condition* which would be intirely defeated, if he had taken the remainder of the legal estate by the former part of the devise; and there-

(1) So *Salvin* v. *Thornton*, 1 *Bro. Cha. Rep.* 73. in note *Amb.* 545. 699. S. C. *Shapland* v. *Smith*, 1 *Bro. Cha. Rep.* 74. *Carpenter* v. *Carpenter*, 1 *Vern.* 440. *Beverley* v. *Beverley*, 2 *Vern.* 131. *Boteler* v. *Allington*, 1 *Bro. Cha. Rep.* 72.

(2) *North* v. *Champernoon* 2 *Cha. Ca.* 63, 78. 1 *Vern.* 13. S. C. 1 *P. W.* 91. S. C.

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fore his Lordship decreed, that the recovery of *D.* barred the remainder to *C.* ROBINSON v. CUMING.

Oliver v. *Taylor.*

July the 13th, 1738.

Case 225.

A common recovery suffered in the common pleas will not pass copyhold lands; otherwise as to customary freeholds.

IF lands are copyhold, a common recovery suffered in the court of common pleas will not pass such lands, but if lands are customary freeholds, and pass by surrender in a borough court, yet a recovery in the common pleas of such lands may be good (1). The case of *Baker* v. *Wase*, in Lord *Macclesfield*'s time, cited.

(1) An issue was directed to try whether the lands in question were copyhold or customary freehold; and if they were capable of being intailed, whether such intail could be barred by surrender or common recovery in the court of the burough, or by common recovery in the court of common pleas at *Westminster*. *Reg. Lib. B.* 1737. fol. 483. The editor has not been able to learn the result of the trial at law.

(B) *What Estate or Interest is not barred by a Fine or Recovery.*

Willis v. *Shorral.*

February the 24th, 1738.

Case 226.

T. B. by proviso in a marriage settlement, gives his wife a power to dispose of 100 *l.* by will to such person as she shall appoint, to be paid to the wife within one year after his death, and in default of such payment, *J. M.* is impowered to make a lease of particular lands to raise this sum. The wife makes an appointment of the 100 *l.* but never received it while living, the heirs of the husband mortgaged the estate to *B.* who when had no notice of this power. Afterwards, on *B.*'s purchasing the estate, the heirs of the husband levy a fine to him, and convey the equity of redemption as a collateral security, who then had notice of the power. Five years incurred after levying of the fine, and no claim on the part of the appointees of 100 *l.* but they now bring their bill to be paid this sum.

The plaintiffs are intitled to 100 *l.* and interest, from the end of one year after the death of *Anne Brickley*, the wife of *T. B.*

THOMAS Brickley, by a proviso in his marriage-settlement, in case he dies without issue, gives his wife *Anne Brickley* a power to dispose of one hundred pounds by will to such person as she shall appoint, such hundred pounds to be paid to the wife within one year after his death, and in default of such payment, *John Moreton* is empowered to make a lease of lands called *Sayres's Farm*, to raise this sum, and when raised the lease to be void. The wife, after the year expired from the death of her husband, makes an appointment of the hundred pounds, but never received it while she was living; the heirs of the husband mortgaged the estate to *B.* who at that time had no notice of this power in the marriage-settlement; afterwards, upon *B.*'s purchasing the estate absolutely, the heirs of the husband levied a fine to him, and in the next place, by way of collateral security, conveyed the equity of redemption to *B.* who then had notice of the power; five years incurred after levying of the fine, and no claim on the part of the appointees of the hundred pounds, who have now brought their bill to be paid this sum.

Mr.

WILLIS *v.* SHORRALL.

Mr. *Fazakerley* for the plaintiff insisted, that nothing can be barred by a fine or non-claim, but what is first devested, that according to the resolution in *Zouch* and *Stoley*'s case in *Plowden's Commentaries* (1) a bare naked power as the present case is, and a mere future interest only, cannot be barred by a fine: the same doctrine is laid down in *Cro. Eliz.* 226. that considering it as a trust, it cannot be barred, for is is expresly admitted, that the buyer had notice of it, and though he was a purchaser for a valuable consideration, yet notice makes him a trustee only, and for this purpose mentioned 2 *Vern.* 194. "A *seised in fee in trust for* B. *for full consideration conveys to* C. *the purchaser having notice of the trust, and afterwards* C. *to strengthen his own estate, levies a fine.* B. *the* cestuique trust, *is not bound to enter within five years, for* C. *having purchased with notice, notwithstanding any consideration paid by him, is but a trustee for* B. (2) *and so the estate not being displaced, the fine cannot bar.*"

Mr. *Willbraham* for the defendant said, that courts of equity govern themselves with regard to fines, as they do at law. for this reason, because they are the common security to estates, and therefore if he should admit this to be an equitable interest in the estate, it is equally barred as if it had been a legal interest, and that it is laid down in Sir *Nicholas Stanton*'s case, by Lord Chief Justice *Hale*, that a fine, and non-claim, is a good bar to an equity of redemption. Cited in *Lingard* v. *Griffin.* 2 *Vern.* 189.

Lord Chancellor: The first question is, Whether this, which is a mere collateral power in the land, can be barred, and will depend on the force and effect of the fine.

Here is, in point of law, a power vested in *John Moreton*, to create a term for years for raising the 100*l.* in default of payment by the heirs or assigns of the testator within one year after his death, the plaintiff therefore had an equitable interest till the same was paid: consider then what effect the fine has either upon the power or the interest.

The mortgagee took, as a collateral security, the conveyance of the equity of redemption after the fine levied; generally speaking, *some right* that a person has in an estate, must be displaced to give a fine any force (3).

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A bare naked power is not barred by any of the statutes of fines (4) otherwise as to an *interesse termini.*

A greater force too has been given to fines by statutes than they had at law, as by the statute of non-claim, *&c.* but I do not find in any of these statutes, that a power is barred by them, but only such *right*, *claim*, and *interest*, which strangers had at the time of the fine levied, unless they pursue their

(1) *Plowd.* 355. *Jenk. Cent.* 266.

(2) See *Saunders* v. *Debenw.* 2 *Vern.*

(3) *Margaret Podger's* case, 9 *Co.* [illegible]. *a.* 1 *Cruise*, 243.

(4) A *collateral* or *naked* power cannot be barred nor extinguished by fine, feoffment, or any other conveyance. *Co. Litt.* 237. *a.* *Albany*'s case, 1 *Co.* 111. *a.* *Digge*'s case, 1 *Co.* 174. *a.* *Edwards* v. *Slater*, *Hard.* 415.

title,

title, claim and intereſt, by action or lawful entry, within five years after the proclamation made and certified. Willis v. Shorral.

How can a ſtranger, as *John Moreton* was, that has no intereſt, make an entry, he who had barely a naked power, and conſequently could not be affected by a fine; for the conſtruction of the ſtatute of 4 *H.* 7. in *Bro. Abr. title Fine, ſect.* 123. as to what a fine will bar, does not at all relate to powers.

But then it may be ſaid, the leſſee of *Moreton* might have entred, for he had a right, by virtue of the leaſehold eſtate, and to be ſure *Saffyn*'s caſe, 5 *Co.* 123. *b.* comes very near this caſe, for nothing can be more like a power than an *intereſſe termini.* " *A man made a leaſe for years of certain land, to begin* " *after the end of a term for years then in being, the firſt years* " *determined, the ſecond leſſee did not enter, but he in the reverſion* " *entered and made a feoffment, and levied a fine of the land with* " *proclamations, according to the* 4 H. 7. c. 4. *and five years* " *paſſed without entry or claim made by the ſecond leſſee, and the* " *queſtion was, Whether the leſſee for years was barred by the fine,* " *and the act of* 4 H. 7.? *Adjudged that this term and intereſt* " *was barred, and both within the letter of the act, and the miſ*" *chief intended to be provided againſt thereby.*"

The next conſideration is, What effect the fine will have upon the equitable intereſt?

And no doubt the rules of this court, with relation to fines, have been taken by analogy from the rules at law, and the effect is the ſame with regard to an equitable intereſt, if of ſuch a nature, that, turned into a legal intereſt, it would have been barred.

But I need not labour this point, for ſuppoſing the equitable intereſt is barred, yet I am of opinion the power is ſtill ſubſiſting in *John Moreton*, and he may make a leaſe till the hundred pound is raiſed.

I do therefore declare the plaintiffs are intitled to a ſatisfaction for the ſum of one hundred pounds, and intereſt from the end of one year after the death of *Anne Brickley*, and do therefore decree the defendants the heirs at law of *Thomas Brickley*, to pay the ſame to the plaintiffs accordingly, with intereſt at the rate of 4 *l. per cent.*

Vide title *Agreements*, &c. *under the Diviſion, When to be performed in Specie.*

Vide title *Forfeiture.*

CAP. L.

Fixtures.

(A) What shall be deemed such.

August the 15th, 1750.

Ex parte Quincy.

Case 227.

A mortgage of a brewhouse with the appurtenances, will not carry the utensils, but the things only belonging to outhouses.

IN 1745 *Robinson* sells the utensils of a brewhouse, and lets a lease of the brewhouse to *Brerewood*, and in 1746 mortgages his brewhouse with the appurtenances, *&c.* to *J. S.* *Brerewood* after this sells his lease and utensils to *Warner*, who for a sum of money in 1748 mortgages the whole to *Robinson*, afterwards *Robinson* becomes a bankrupt, and his effects are vested in the petitioner as assignee under the commission, who, as standing in the place of the bankrupt, is intitled to the mortgage from *Warner*, and by virtue thereof claims the utensils.

J. S. the mortgagee of the brewhouse in 1746 insists the fixtures passed by his mortgage; this petition preferred therefore for a delivery of all the utensils.

Mr. Attorney General, for the mortgagee, cited *Owen* 71. under title *Heir and Ancestor*.

Lord Chancellor: This is a case for a mere action at law, and might be determined by action of trover or detinue.

I am inclined to think it was not the intent of *Robinson* to mortgage the utensils; for there is some description generally of things in a brewhouse.

The manner of describing the parcels shews he did not at all mean to mortgage utensils, for the word *appurtenances* seems to intend only things belonging to out-houses.

An executor cannot enter to take away fixtures, without being a trespasser.

The rule as to fixtures, as between an heir and executor, is another thing. The freehold descending on the heir, the executor cannot enter to take away fixtures without being a trespasser (1).

A tenant during the term may take chimney pieces, and even wainscot, if after he is a trespasser.

But there is another rule between landlord and tenant: During the term a tenant may take away chimney pieces, and even wainscot (2), which is a very strong case, but not after the term, if he did, he would be a trespasser.

A mortgage, says *Mr. Attorney General* is a purchase, but then it is a redeemable one.

How does it stand between a purchaser and a vendor?

(1) See *Lawton* v. *Lawton*, in *B. R.* Easter 22 *Geo.* 3. cited in the note at the end of the case of *Lawton* v. *Lawton*, *post* 3. vol. 13.

(2) *i. e.* if put up by himself.

If a man sells a house where there is a copper, or a brewhouse where there are utensils, unless there was some consideration given for them, and a valuation set upon them, they would not pass.

Ex parte QUINCY.
By the sale of a brewhouse, the utensils will not pass.

But then another question will arise after possession is delivered, what action you can bring? For where things are fixed to the freehold, an action of trover will not lie for them.

Several sorts of things are often fixed to the freehold, and yet may be taken away, as beds fastened to the cieling with ropes, nay, frequently nailed, and yet no doubt but they may be removed.

Beds fastened to the cieling with ropes, or even nailed, are not fixtures, but may be removed.

The difficulty with me is the possession of the mortgagor, but that is cleared up, because it was the express agreement between the parties, that the mortgagor should not be prevented from coming on the brewhouse.

I apprehend the sale of the utensils was a defeasible sale, to revert to the bankrupt at the end of the term, and if so, there is an equity in the grantor, and therefore, as to the mortgagee, a possession in the bankrupt.

Let it stand over to the next day of petitions, and let the mortgagee produce all deeds and writings, and assignee at his expence to take copies if he pleases.

CAP. LI.

Forfeiture.

Brandlyn v. *Ord.* — *November* the 15th, 1738.

Vide title *Purchase, under the Division, of Purchasers without Notice.*

Vide title *Custom of London.*

CAP. LII. [479]

Freeman of London.

Ex parte Carrington. *January* the 22d, 1739.

Vide title *Bankrupt, under the Division, Who are liable to Bankruptcy.*

CAP. LIII.

Fraud.

Michaelmas Vacation, 1737.

Nicholls v. *Nicholls*.

Vide title *Deeds and other Writings, under the Division, Deeds and Instruments entred into by Fraud, in what Cases to be relieved against.*

Vide title *Bill*.

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CAP. LIV.

Guardian.

(A) *What Acts of his with regard to the Infant's Estate shall be good.*

July the 28th, 1739.

Pierson v. *Shore*.

Case 228.

A. who had a bishop's lease to her and her heirs during three lives, devises the same to her daughter an infant, and directs the guardian and trustees to make purchases for the infant's benefit. The guardian, upon the decease of one of the three lives, took a new lease for three new lives. The infant dies. The lease shall go to the heirs of the infant *ex parte paterna*; for the new lease is to be considered as a new acquisition, and to vest in the infant as a purchase.

A. Who had a bishop's lease to her and her heirs during three lives, devises the same to her daughter who was an infant, and directs the guardian and trustees appointed by her will, to make purchases for the benefit of the infant. After the death of the mother, the guardian, upon the death of one of the three lives, took a new lease for three new lives, and the infant being now dead, the question before the court was, Whether this new lease should go to the old uses? To the heirs *ex parte maternâ*, as the first lease would have done, or whether to the heirs of the infant *ex parte paternâ*.

Lord Chancellor: This is a descendible freehold, and if nothing had been altered, would have gone to the heir *ex parte maternâ*; but the new lease is to be considered as a new acquisition, and to vest in the infant as a purchaser; how then will this go, considered as a new purchase?

If

If the infant had lived till full age, and then had furrendred the old leafe and taken a new one, this certainly would have gone to the heirs *ex parte paternâ*; fo if all the lives had died, and the guardian had renewed the leafe, it would likewife have gone to the heirs on the part of the father; and this is not like the cafe of an infant's perfonal eftate turned into real, for the reafon of that's being ftill confidered as perfonal eftate, is, becaufe of the different ages at which the infant might difpofe of his perfonal, and his real eftate, and not out of favour to any one reprefentative more than another. *Indeed in the cafe of a leafe in truft, whatever new alterations are made, it is ftill fubject to the old truft* (2).

PIERSON v. SHORE.

The reafon why an infant's perfonal eftate turned into real, is ftill confidered as perfonal, is on account of the different ages at which the infant may difpofe of his perfonal, and his real, and not in favour to one reprefentative more than another (1).

It has been objected, that this was an act done by a guardian only during the minority, and ought not to prejudice any who take by reprefentation, it being an act merely voluntary, and not out of neceffity.

*If this indeed had been wantonly done by the guardian, without any real benefit to the infant, it would have been proper to come into a court of equity to be relieved againft it; but here was a juft and reafonable occafion for what the guardian has done, for he was directed by the mother to make purchafes for the benefit of the infant. Here one life being dead, furrendering the old, and taking a new leafe, was the moft beneficial purchafe for the infant that could be, and therefore ought to have the fame confequence as if done by the infant herfelf at full age, *and go to the heirs ex parte maternâ*. The cafe of *Mafon* v. *Day*, is exactly in point with the prefent, *Prec. in Chan.* 319. "A feme purchafes a church leafe to her and her "heirs for three lives, and dies, leaving an infant daughter, "two of the lives die, the infant's guardian renews the leafe, "*this is a new acquifition, and fhall go to the heirs on the part of the* "*father*" (3). [*481]

The act of a guardian where a reafonable one will have the fame confequence as if done by the infant at full age, otherwife if wantonly done by the guardian, without any real benefit to the infant.

His Lordfhip therefore difmiffed the bill brought by the heir *ex parte materna*.

(1) *Whitter* v. *Whitter*, 3 *P. W.* 100. note D. *Rook* v. *Warth*, 1 *Vef.* 461.

(2) So *Holt* v. *Holt*, 1 *Cha. Ca.* 191. *Abney* v. *Miller*, *poft.* 2 vol. 597. *Edwards* v. *Lewis*, *poft.* 3 vol. 538. *Pickering* v. *Vowles*, 1 *Bro. Cha. Rep.* 197. *Raw* v. *Chichefter*, *Amb.* 715. 1 *Bro. Cha. Rep.* 198. S. C. note. *Owen* v. *Williams*, *Amb.* 734. 1 *Bro. Cha. Rep.* 199. S. C. in note. *Tafter* v. *Marriot*, *Amb.* 668. *Sed vide Darrel* v. *Whitchot*, 2. *Cha. Rep.* 59.

(3) 2 *Eq. Ab.* 494. *pl.* 7. S. C. *Gilb. Eq. Rep.* 77. S. C. See *Amb.* 719. where this cafe of *Peirfon* v. *Shore* is cited under the name of *Mafon* v. *Shore*.

C A P. LV.

Habeas Corpus.

May the 12th, 1742.

Ex parte Lingood.

Vide title *Bankrupt, under the Division, Rule as to a Certificate from Commissioners to a Judge.*

C A P. LVI.

Heir and Ancestor.

[482] (A) *Where Charges and Incumbrances on the Lands shall be raised, or shall sink in the Inheritance for the Benefit of the Heir.*

(B) *Where the Heir shall have the Aid and Benefit of the Personal Estate.*

(A) *Where Charges and Incumbrances on the Lands shall be raised, or shall sink in the Inheritance for the Benefit of the Heir.*

Vide title *Conditions and Limitations, under the Division, In what Cases a Gift or Devise, upon Condition not to marry without Consent, shall be good and binding, or void, being only* in terrorem. Hervey *v.* Aston.

Easter Term, 1738.

Prowse v. *Abingdon.*

Case 229.

S C. cited Com Rep 718. 2 Eq Ca. Abr. 464. n S C.

THOMAS Compton, by will dated the 13th of *August* 1718 devises all his lands in general words to *John Clement*, and *John Prowse*, and their heirs in trust, and to the uses, intents and purposes following, *viz.* that they should sell all his lands lying

T. C. devised all his lands to *T. C* and *J P* and their heirs in trust, that they should sell his lands in *M.* and *P.* and out of the purchase money pay his debts, and as to the rest in trust, to receive the rents and to make leases for years, determinable, *&c* and therewith to pay his debts and legacies, then to the use of *A. A* wife of *C. A.* for life, remainder to the issue male and female of her body, and makes the trustees executors; he likewise gives a legacy of 500*l.* to his nephew *Thomas Prowse*, to be paid at 21, or marriage, who died before 21.

Personal estate of the value of 7000*l.* the lands in *M.* and *P.* not sufficient to pay the debts.

Bill brought by the administrator of *Thomas Prowse* to have the 500*l.* raised. The *Lord Chancellor* of opinion, as the legacy was charged upon the real as well as personal estate, it could not be raised, as the legatee died before the time of payments and dismissed the bill (1).

(1) See *Bond* v. *Brown*, 2 *Cha Ca* 321 *Smith* v *Smith*. 2 *Vern*. 92 *Yates* v. *Phettiplace*, 2 *Vern* 416 *Cha Prec.* 140. *Paulett* v. *Paulett*, 1 *Vern.* 204.

lying in *Mindford* and *Pinard*, and out of the purchase money arising from such sale should pay and satisfy the testator's debts, as far as the same will go, and as to the rest of the lands, *&c.* the will declares that the trustees should stand seised of them, in trust to receive the rents, issues, and profits thereof, and to make leases of the same, for the term of 99 years determinable on three lives, and therewith to pay all the testator's debts and legacies, that then they should stand seised to the use of *Isabella Abingdon*, wife of *Charles Abingdon*, and sister of the testator for life, remainder to the issue male and female of her body, remainder over, *&c.* and makes the trustees executors of his will. He bequeaths likewise a legacy of 500*l.* to his nephew *Thomas Prowse*, to be paid at his age of twenty-one, or marriage. PROWSE v. ABINGDON.

The nephew died before he attained the age of twenty-one, and unmarried.

The personal estate of the testator was about the value of 700*l.* the estates in *Mindford* and *Pinnard*, were not sufficient to pay the testator's debts.

The bill is now brought by the administrator of *Thomas Prowse* to have the sum of 500*l.* raised against the defendant, who claims the lands under *Isabella*, subject to the payment of testator's debts and legacies, upon a supposition that *Thomas Prowse* had an interest vested in this legacy, transmissable to his representative, though the legatee died before the time of payment came. [483]

Mr. *Chute* for the plaintiff insisted, that this case was very different from that of a devise of lands to a third person, charged with the payment of legacies out of it, that the land here devised to the trustees for the payment of debts and legacies, must be considered as the personal estate of the testator according to the general doctrine of a court of equity, which often considers land as money, and *vice versâ*, according to the nature of the case, and the intention of the party who directs the disposition of the one or the other; that the trustees might in fact have entred here, and continued in possession till they had received money enough by the rents and profits, and fines taken upon granting long leases, according to the power given by the will, to pay off all the debts and legacies; and in such case, as the fund out of which this legacy would be payable, would be personal estate, the contingency of the legatee's dying before the age of 21, or marriage, not being annexed to the devise of the

140. S. C. *Carter* v. *Bletsoe*, *Prec. Cha.* 267. 2 *Vern.* 617. S. C. *War* v. *War*, *Prec. Cha.* 213. *Tournay* v. *Tournay*, *Prec. Cha.* 290. *Stapleton* v. *Cheeles*, *Cha. Prec.* 318. *Jennings* v. *Looks*, 2 *P. W.* 270. *Bateman* v. *Roach*, 9 *Mod.* 106. *Gordon* v. *Raynes*, 3 *P. Wms.* 134. *Bradley* v. *Powell*, *Ca. temp. Talb.* 193. *Hall* v. *Terry*, *post.* 502. *Vau* v. *Clarke*, *post.* 512. *Boycot* v. *Cotton*, *post.* 555. *Richardson* v. *Greese*, *post.* 3 vol. 69. *Attorney General* v. *Milner*, *post* 3 vol. 112. *Basset* v. *Basset*, *post.* 3 vol. 207. *Sherman* v. *Collins*, *post.* 3 vol. 320. The reader is referred to Mr. *Cox*'s note to 2 *P. W.* 612, and to *Butl. Co. Litt.* 237. *a.* note 1.

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legacy itſelf, but to the time of payment, the plaintiff would be intitled.

Secondly, It muſt however be admitted that this legacy was chargeable upon the perſonal as well as the real eſtate, and as the perſonal eſtate is the primary and natural fund to be charged, and the real eſtate comes in only in aid of the perſonal eſtate, and as a ſecurity only for payment of the money, the real eſtate here ought to be ſubject to the ſame rules with the perſonal, and ſubſervient to the ſame purpoſes, and more eſpecially ſo, ſince in order to avoid that confuſion which muſt otherwiſe follow, if, in determining whether this legacy was due or not, regard ſhould be had to the different reſolutions which prevail in caſes of this kind, where the perſonal eſtate only, or the real eſtate only, is charged with the payment of legacies.

Thirdly, That admitting this legacy was chargeable only on the real eſtate, yet the rule which has prevailed, for portions to ſink into the eſtate for the benefit of the heir at law, will not extend to the preſent caſe, nor is this within the reaſon of thoſe caſes of portions, which have always been determined on this foot, that children dying before they could want their portions, there could be no occaſion for raiſing them, nor is it to be ſuppoſed the teſtator could intend to have ſuch ſum raiſed merely in prejudice of any other child, who ſhould have the eſtate, when no proviſion of that kind was now wanted. He cited the caſe of *Jackſon* v. *Farrand*, 2 *Vern.* 424.

[484] Mr. *Fazakerley* on the ſame ſide inſiſted, that the truſtees to whom this deviſe is made being likewiſe executors, the eſtates deviſed muſt be conſidered as perſonal legal aſſets in their hands, and governable by the ſame rules as if the teſtator had actually left perſonal aſſets in ſpecie to that value. He cited for this purpoſe 1 *Lev.* 224. and relied on what is there ſaid by Mr. Juſtice *Twiſden*, and alſo *Dyer* 264 *b* *No.* 41. He likewiſe inſiſted, that it appeared there were ſufficient perſonal aſſets left in ſpecie to ſatisfy this legacy, as the other creditors and legatees had an undoubted right to take their remedy againſt the land for a ſatisfaction of their debts and legacies, and if the plaintiff cannot be intitled to this legacy, ſuppoſing it to be chargeable on the land, this court will ſo marſhal the aſſets as will make every part of the will effectual, and charge the perſonal eſtate only with the payment of this legacy. He relied likewiſe much on the caſe of *Jackſon* v. *Farrand*.

Money ariſing from the ſale of a real eſtate is legal aſſets only where it is ſold under a bare power, given to ſell, not where the intereſt in the eſtate paſſes by the will to thoſe deviſees; and making the truſtees executors does not alter the caſe.

Lord Chancellor before they began for the defendant, interpoſed, and ſaid he was clearly of opinion the eſtates deviſed could not be conſidered as perſonal aſſets at law, in the hands of the truſtees; that by the deviſe in general of all his lands to them and their heirs, here was plainly a diſpoſition of the eſtate to them, and a truſt created in them for the payment of debts; and that money ariſing from the ſale of a real eſtate was legal aſſets only, where the eſtate was ſold under a *bare* power given to

ſell,

fell, and not where the interest in the estate passed by the will to the devisees as it did here, and that making the trustees executors likewise, could not alter the case (1). PROWSE v. ABINGDON.

That the other part of the devise, whereby the devisees are directed to receive the rents, &c. could with much less colour admit of the construction contended for, but was in the nature of the thing plainly intended as a trust; and taking notice likewise of what had been said by Mr. *Fazakerley*, that as to this part of the case it might be considered as a devise to them of the legal estate, *quousque* they should have received sufficient out of the real, &c. to answer the purpose, and that then the estate should vest in *Isabella* by way of executory devise; *his Lordship* said, supposing such a construction should be suffered to prevail, yet there is no colour for saying the rents, &c. so received would be legal assets, and put the case of a devise to *A.* and *B.* and their heirs, till such a sum should be raised for the payment of debts and legacies, would that create a fund of legal assets? At that rate a legatee might sue *A.* and *B.* under those circumstances, in the ecclesiastical court; but such a jurisdiction in a case of that kind was certainly never thought on, nor can it possibly be maintained: but a provision of that sort is proper only to give the devisee an interest in the estate specifically, not to turn the lands into personal estate, and make them legal assets in the hands of the devisee.

A devise to *A.* and *B.* and their heirs till such a sum be raised, for payment of debts, does not create a fund of legal assets, but is proper only to give the devisee an interest in the lands specifically, not to turn them into personal estate.

Mr. *Attorney General* for the defendant, insisted on the settled distinction between legacies charged on the real, and those charged on the personal estate. Where a legacy is charged on the personal, and made payable at a future day, and the legatee dies before the day of payment, the court, in compliance with the rule of the civil law, and in order to make the proceedings in this and the ecclesiastical court (as they have a concurrent jurisdiction) uniform and consistent, has determined such legacy shall not be considered as a lapsed legacy, but shall go to the representative. But that rule has never been extended to charges on a real estate; that there was no ground whatever for the distinction taken between a legacy as here, and money given to a child by a parent as a portion, nor is it supposed by any authority; but the only question in such case is, upon what fund the charge is laid, whether on the real or personal estate? That the case of *Jackson* v. *Farrand*, as appears by the report of it in *Prec. in Chanc.* 109. turned intirely upon this; that the legatee there died after marriage, and *that* therefore having happened, which was the cause of the portion, it should be raised after her death. [485]

That it was not at all material here; that the legacy was charged on a mixed fund, or real and personal estate too; that so it was in the case of *Jackson* v. *Farrand*; but this objection

(1) But see *S[illegible]* v. *Prime*, 1 *Bro. Cha. Rep.* 138, in note, and *Blatch* v. *Wilder*, *ant.* 420, note.

was

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was not so much as made; so it was in the case of the *Duke of Chandos* v. *Talbot*, in Lord Chancellor *King*'s time, *Mich.* 5 *Geo.* 2. where a sum of money was by will charged on the real and personal estate of the testator, payable at the age of 21; it was held in that case, that the legatee dying before the age of 21, his representative was not intitled, but the bill was dismissed, and the Lord Chancellor in that case cited the case of *Jennings* v. *Lukes* in the time of the Lords Commissioners, exactly to the same purpose, 2 *P. Wms.* 276. Mr. Attorney General cited the case of *Yates* v. *Fettyplace*, 2 *Vern.* 416. *Carter* v. *Bletsoe*, 2 *Vern.* 617. and Mr. *Floyer*, of the same side, cited *Smith* v. *Smith*, 2 *Vern.* 92.

Lord Chancellor said, the only inducement he had to suffer so long a debate in this court by the bar, was, in order to receive satisfaction as to the point, which had been insisted on in relation to this legacy being chargeable on a mixed fund, consisting of real and personal estate too.

Such strong resolutions that there is no difference between a charge on the real estate only, and a charge on the real and personal estate too, they are not to be shaken now.

He said, that was a difficulty which always stuck with him, and it was something very extraordinary that the real estate, which was only an auxiliary fund to the personal, should, in cases of this kind, be chargeable in a different manner, and not be made liable to the same rules and determinations with the primary security the personal estate; but he said he found the resolutions so strong, that there was no difference between a charge on the real estate only, and a charge on the real and personal estate too; that he could not at this time of day, think of determining in a different manner (1).

Whether a charge on land be created by deed or will, whether given by way of portion for a child, or merely as a legacy by collateral relations, or others, if the party dies before the day of payment, cannot be raised.

* He said it was very clear that charges on land, payable at a future day, could not be raised, if the party died before the payment; that there was no difference at all, whether that charge was created by deed or will, nor whether it was provided by way of portion for a child, or given merely as a legacy by collateral relations, or others; and this was the case in the *Duke of Chandos* v. *Talbot*, and *Jennings* v. *Lukes*, in which he was counsel, for in neither of them was the provision made by a parent (2).

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As to what is said, that the assets may be so marshalled as for the present plaintiff to receive a compleat satisfaction out of the personal estate, though the executors were not before the court, and so impossible to make any decree on that foot, yet if they thought it would be material, he would retain the bill, with liberty to make the executors parties; but he said, he conceived that point could by no means be maintained, for that rule of marshalling assets in the manner before mentioned, would hold only where it was proper to be done at the time the legacy first took place, and not where it was owing to a fact, which happened subsequent to the death of the testator,

(1) See *Reynish* v. *Martin*, *post*. 3 Vol.

(2) See cases cited in note 1. *supra* 482, and *Hall* v. *Terry*, *post*. 504.

and

and to a mere accident, as here, the death of the legatee before 21. (1).

PROWSE v. ABINGDON.

He ſaid the reſolution in the caſe of *Jackſon* v. *Farrand* was founded on a ſingle circumſtance, the marriage of the legatee, which being the foundation of that judgment, implies plainly if the caſe had ſtood only on the deviſe to the legatee at the age of 21, and ſhe dying before that time, that the court would, in that caſe, have determined againſt the plaintiff, if they could not have laid hold on the circumſtance of marriage; beſides, the authority of that caſe ſeems to be much weakened by the ſubſequent reſolution in *Carter* v. *Bletſoe*.

The authority of Jackſon v. Farrand, 2 Vern. 424. much weakened by the ſubſequent reſolution in Carter v. Bietſoe, 2 Vern. 617.

I have often heard it ſaid, that the reaſon why legacies, &c. charged on land, payable at a future day, ſhall not be raiſed, if the legatee dies before the day of payment, though it is otherwiſe in the caſe of a charge on the perſonal eſtate, is this, that the heir is a favourite of a court of equity, and ought to have the preference of the repreſentative of a legatee, and likewiſe that the court will go as far as they can in keeping the real eſtate intire, and as free from incumbrances as poſſible.

But I think the court has never gone upon ſuch reaſon, but the true reaſon I take to be this, that the court will govern themſelves as far as is conſiſtent with equity by the rules of the common law. In the caſe of perſonal eſtate, the rule is the ſame here as in the civil law, that there may be an uniformity of judgments in the different courts; but in the caſe of lands, the rule of the common law has always been adhered to: as ſuppoſe a perſon ſhould covenant to pay money to another at a future day, if the covenantee dies before the day of payment, the money is not due to his repreſentative. The ſame rule holds in the caſe of a promiſe to pay money, &c.

The bill diſmiſſed.

The true reaſon why legacies, &c. charged on land, payable at a future day, ſhall not be raiſed if legatee dies before the day of payment, is, that this court governs itſelf by the rules of the common law; for there if *A.* covenants to pay money to *B.* at a future day, and *B.* dies before the day, the money is not due to his repreſentative.

(1) See *poſt.* 3 vol. 335.

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(B) *Where the Heir ſhall have the Aid and Benefit of the Perſonal Eſtate.*

Bartholomew v. *May*.

February the 7th, 1737.

Caſe 230.

THE teſtator   *May*, deviſes his lands at *Hadlow* to *Richard May* in tail, remainder over, &c. then in mortgage for 1300 *l.* and deviſed other lands to *Thomas May*, ſubject however to the payment of his debts, in caſe his perſonal eſtate, and other eſtates deviſed for that purpoſe, ſhould not prove ſufficient to ſatisfy all the debts.

A. deviſes lands to *R. M.* in tail then in mortgage for 1300*l.* and deviſed other lands to *T. M.* ſubject to the payment of his debts, in caſe his perſonal eſtate ſhould not prove ſufficient.

BARTHOLOMEW v. MAY. The 1300*l.* must be paid as a debt out of the testator's personal estate, and, if deficient, out of the real estate so devised to T.M. Where a mortgage is made by a person who is owner of the estate, that mortgage is looked upon as a general debt, and the land only as a security; and therefore personal estate shall be applied in discharge, but if the contest lay between R. M. and creditors of the testator, it would have been otherwise.

Lord Chancellor: I am of opinion that the 1300 *l.* must be paid as a debt of the testator out of the personal estate; or, if that proves deficient, out of the real estate so devised (1); for wherever there is a mortgage made by a person who is owner of the estate, that mortgage is looked upon as a general debt, and the land only as a security, and therefore the personal estate shall be applied in discharge of the 1300*l.* though there may be younger children of the mortgagor who may be no otherwise provided for: but I think clearly the case would be otherwise, if the contest was between *Richard May* and any creditors of the testator, who would lose their debts, if the mortgage was so paid off out of the personal assets, or the money arising from the sale of lands devised for that purpose.

In the case of *Lord* v. *Lancaster*, 2 *Vern.* 183. it is laid down otherwise, that the devisee of the mortgaged estate shall take it *cum onere*; but I do not pay any great regard to it, because it does not appear whether there was a sufficiency of assets or not to satisfy the rest of the creditors.

N. B. His Lordship said in this case, that where a testator devises expresly that the timber upon a particular estate shall be cut down for payment of debts, it is a hardship upon the first taker of the estate; but he must submit, for here the timber is devised one way, and the estate another, for the timber is devised to *Richard May* and his heirs upon trust, to cut down and sell for discharge of debts, *&c.* and this is the strongest case that can be of the kind, but the devisee of the estate may buy, and so prevent the defacing of the estate.

[488] *His Lordship* declared that the mortgage for 1300*l.* on the testator's estate at *Hadlow* and interest thereof, is a debt of the testator's to be satisfied out of his personal estate and trust estate (2).

(1) So *Tweedale* v. *Coventry*, 1 *Bro. Cha. Rep.* 240, See Mr *Cox*'s notes to *Howell* v. *Price*, 1 *P. W.* 294, and to *Evelyn* v. *Evelyn*, 2 *P. W.* 664

(2) *Reg. Lib. A.* 1737 *fol.* 411.

Vide title *Portions*, *under the Division*, *At what Time they shall be raised*, &c.

Vide title *Real Estate.*

Vide title *Resulting Trusts.*

Vide title *Conditions and Limitations.*

Vide

Vide title *Legacies, under the Division, Of a lapsed Legacy by Legatees dying.*

Vide title *Creditor and Debtor.*

Vide title *Catching Bargain.*

Vide title *Papist.*

Vide title *Tenant by the Curtesy.*

C A P. LVII.

Husband and Wife.

Vide title *Baron and Feme.*

C A P. LVIII.

Infants.

(A) *How far favoured in Equity.*
(B) *What acts of Infants are good, void, or voidable.*

(A) *How far favoured in Equity.* [489]

Hilary Term, 1737.

Morgan v. *Morgan*.

Case 231. Where any person enters upon an infant's estate and continues the possession, this court considers him as a guardian and will decree an account, and to be carried on after the infancy is determined, unless the infant after being of age waived such account.

LORD *Chancellor*: Where any person, whether a father or a stranger, enters upon the estate of an infant, and continues the possession, this court will consider such person entering as a guardian to the infant, and will decree an account against him, and will carry on such account after the infancy is determined; but from the inconveniency of such long accounts whenever it comes in proof, that the infant, after being of age, has waived such account, this court will lay hold of any such thing to put an end to it; though indeed, in the case of a father,

Morgan *v.* Morgan.

ther, the court is not so strict, as imagining the parental authority might hinder the bringing any bill or ejectment to recover the possession.

May the 31st, 1738. *Lincoln's Inn Hall.*

Anon'.

Case 232.
S. C. post. 578.
The court will not appoint a receiver of an infant's estate where there is no bill filed.

THERE is no instance of appointing a receiver of the rents and profits of an infant's estate, where there is no bill depending in this court, if it were only filed there might be an application for this purpose on behalf of the infants (1).

(1) *Ex part Whitfield, post.* 2 vol. 315.

(B) *What Actions of Infants are good, void, or voidable.*

June the 26th, 1739.

Smith v. *Low.*

Case 233.
R. L. devised some land and houses built thereon to his six children; the mother is guardian to the children, who were all infants, demised the premisses on a building lease for 41 years. The eldest son joined in making the lease, and covenanted that the rest of the children when of age should confirm it.

They all attained 21, and accepted the rent for above ten years, after the youngest came of age, and then brought their ejectment against the lessee, who by his bill prays to have his lease established.

Under the circumstances of the case, and particularly the acceptance of the rent for so long a continuance, the court decreed the lease to be established during the residue of the term.

Where a person is of age when he makes a lease, and has nothing in the premisses, but they after descend to him, the lease shall enure by way of estoppel, otherwise if he had been an infant.

RICHARD *Lloyd* devised some land and houses built thereon to his six children; the mother acting as guardian to the children, who were all infants, demised the premisses on a building lease for forty-one years; her eldest son who was about 19 years of age, joined with her in making the lease, and covenanted that the lessee should have quiet enjoyment, and that * the rest of the children, when of age, should confirm the lease; the children all arrived at age, and accepted the rent for above ten years after the youngest came of age, under this lease; after such acceptance brought their ejectment against the lessee; and the bill is brought to have the lease established.

[*490] *Lord Chancellor:* The chief question is, if this lease is good, and ought to be established in a court of equity, under the circumstances of this case; and it is not material in the present question, whether the lease be or be not good in law, as against the infant who signed it, for as the plaintiff comes into equity, it must be supposed bad, though as to one sixth part it is certainly good, as against him, by acceptance of the rent (1), and yet as to the other two parts which descended on him, I think

(1) So 3 *P. W.* 209. *Vide* also 4 v. *Parsons,* 3 *Burr.* 1794. *May* v. ... 4. *pl.* 15. *Har. Co. Litt.* 45. *b. n.* *Hooke. Har. Co. Litt.* 246. *a.* in note 1. ... 51. *b. n.* 3. *Litt. f.* 258. 547. *Zouch*

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it will not be good by way of estoppel; for notwithstanding where a person of age makes a lease, and has nothing in the premisses, but they after descend to him, this lease shall enure by way of estoppel (1), yet that arises from the deed, and so cannot act as an estoppel against an infant, whose deed is never good.

SMITH v. LOW.

But here the lease is to be made good upon equitable circumstances, and it appears to be for a valuable consideration, rent reserved, and covenants for the lessee to leave it in good repair, and it is mentioned by the mother, who acts as guardian, to be for the benefit of the infants; there is no fraud or collusion proved in the lessee, and the husband of the lessor, and father of the infants, died in bad circumstances, unable to repair the premises, which were houses, and a mill, therefore the consideration of the lessee's repairing them, is a beneficial one for the infants, and that is sworn to be done; and there are several cases where this court binds infants to contracts made in their behalf, as marriage contracts (2), especially if the wife accepts pin-money, or after the husband's death accepts the jointure under that contract, and here the great point is, the acceptance of the rent for so long a continuance, the youngest having been of age ten years, and notice of this lease is to be presumed in all this time. They found a person in possession of their estate, and that was sufficient to put them to inquire, and what is sufficient to put the party upon an inquiry, is good notice in equity.

An infant bound in this court by a marriage contract, especially if she accepts pin-money, or after the husband's death, a jointure under the contract.

Whatever is sufficient to put a party on an inquiry, is good notice in equity to that party.

His Lordship therefore declared that the plaintiff, under the circumstances of the case, is intitled to have the lease established during the residue of the term, and decreed accordingly; and as it was against conscience to bring ejectments after these transactions, ordered that the plaintiff should have costs at law, and in equity (3).

(1) See *Co. Litt.* 47. *b.*
(2) See *Harvey* v. *Ashley*, *post.* 3 vol. 607.
(3) *Reg. Lib. B.* 1738. fol. 475.

Vide title *Guardian.*

Vide title *Devises, under the Division, Of Devises of Lands for Payment of Debts.*

Vide title *Will.*

Vide title *Plantations.*

Vide title *Marriage, under the Division, Where it is Clandestine.*

Vide title *Injunction.*

CAP LIX.

Injunction.

(A) *In what Cases, and when to be granted.*

(B) *Rule as to Injunctions where Plaintiff is a Bankrupt.*

(A) *In what Cases, and when to be granted.*

February the 12th, 1738.

Case 234.

Where there is a trust, or any thing in nature of a trust, notwithstanding the ecclesiastical court have an original jurisdiction in legacies, yet this court will grant an injunction.

Anon'.

A Bill brought for an injunction to stay a suit in the ecclesiastical court for a legacy, because that court cannot make a legatee refund in case of a deficiency of assets, and this being the day for shewing cause why the injunction should not be dissolved, the counsel for the plaintiff relied on the case of *Knight* v. *Clark*, cited in the case of *Noel* v. *Robinson*, 1 *Vern.* 93. where *Lord Chancellor* said, there was a difference between a suit for a legacy in the Spiritual court, and in this court; if in the Spiritual court they would compel an executor to pay a legacy, without security to refund, there shall go a prohibition.

Lord Chancellor continued the injunction till the hearing, because the plaintiff is an executor in trust only, for where there is a trust, or any thing in the nature of a trust, notwithstanding the Ecclesiastical court have an original jurisdiction in legacies, yet this court will grant an injunction, trusts being only proper for the cognizance of this court.

The rule in this court now is varied since the case in *Vernon's Reports*, for legatees are not obliged to give security to refund upon a deficiency of assets.

Where the husband of an infant institutes a suit in the ecclesiastical court for her legacy, upon the executor's bringing a bill, and suggesting this matter to the court, an injunction will be continued to the hearing.

His Lordship mentioned a case where a woman an infant was intitled to a legacy upon her marrying, the husband instituted a suit in the Ecclesiastical court for it, which he might do; but upon the executor's bringing a bill, and suggesting this matter to the court, an injunction was continued till the hearing of the cause (1); and the same order was made in the present case.

(1) See *Hill* v. *Turner*, *post.* 516. *post.* 2 vol. 420. *Prec. Cha.* 548.

(B) *Rule as to Injunctions where Plaintiff is a Bankrupt.*

November the [illegible], 1748.

Anon'.

Vide title *Bankrupt, under the Division, Bankruptcy no Abatement.*

Vide title *Marriage, under the Division, Where it is clandestine.*

Vide title *Will, under the Division, The Power of this Court over the Prerogative Court.*

CAP. LX.

Insolvent Debtor.

Ex parte Green. *August* the 7th, 1745.

krupt, under the Division, Rule as to the Insolvent rs' Act under Commissions of Bankruptcy.

CAP. LXI.

Jointenants and Tenants in Common.

Hilary Term, 1737.

Prince v. *Heylin*.

THE testatrix in this case being a lessee for a term of years, of two houses in *London*, devised the same *to her nephew* John Prince, *pewterer, and* John Heylin, *clerk*, generally, and then the will goes on thus, "*and my will and meaning is, that the rents of my said two houses shall be equally shared and divided between them, the said* John Prince *and* John Heylin, *clerk, as aforesaid.*" The testatrix soon after dies. Case 235. A testatrix devises two houses to *J. P.* and *J. H.* generally, and then says my meaning is, that the rents of my two houses *should be equally shared* between *J. P.* and *J. H.*

The devisees shall take as *tenants in common*, and not as jointenants.

John Prince survived the testatrix, and died in 1721, ever since the premisses have been enjoyed by the defendant as the survivor.

This bill is now brought by the administrator of *Prince*, to have an account of the rents and profits.

The question was, Whether, by the words in the will, a jointenancy, or a tenancy in common, was created.

It was agreed clearly, that if the words *equally shared* had been annexed to the thing itself, they would have created a tenancy in common, but insisted upon at the same time, that the former are plainly words of jointenancy, and the subsequent amount only to a direction in what manner the profits should be received during the lives of the devisees, *viz.* to each of them an equal share, which is saying no more than what otherwise the law would direct.

PRINCE v. HEYLIN.

Lord Chancellor: I am clearly of opinion, the devisees were tenants in common, that had the testatrix expressly directed the rents to be shared during the joint lives of the devisees, it might admit of some doubt, but with regard to the time, the latter part of the devise was as general as the former, and the word *rents* will as properly pass the interest in the houses, as any other word whatever. This is therefore a plain tenancy in common (1):

J. H. having on the death of *J. P.* taken possession of the two houses as survivor, and enjoyed them ever since, must account for the rents as far back as the death of *J. P.* and not from the filing of the bill

With regard to the time the defendant is to account for the rents and profits, there having been no entry made or demand of the rents, *&c.* it has been insisted on for the defendant, he ought to account only from the time of the bill filed: now in the case of jointenants or parceners, there is a mutual trust * between them, and they are accountable to each other, without regard to the length of time; it is otherwise in the case of tenants in common, and this is an adversary possession maintained by the defendant against the plaintiff ever since the death of his intestate: however the statute of limitations is a bar to any demand further back than six years, and by the 4 *Ann. c.* 16. *s.* 27. An action of account lies for one tenant in common against another, and such action is expressly mentioned in the statute of limitations, and as there is no remedy at law, there can be no reason for any in equity.

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Ejectment not maintainable by one tenant in common against another without an actual ouster. If the statute of limitations be neither pleaded, nor insisted on by the answer, you cannot have the benefit of such bar.

I am of opinion the defendant must account for rents and profits from the death of the intestate, the nature of the estate devised not admitting of an adversary possession, in regard of the privity that is between tenants in common: an ejectment is not maintainable by one tenant in common against another, without an actual ouster (2): no advantage can be now taken of the statute of limitations, it not being pleaded by the defendant, or insisted on by his answer, which in all cases is necessary, in order to have the benefit of such bar to the plaintiff's demand, though indeed the court sometimes, when there is a very stale demand, notwithstanding the statute is not pleaded, will in it's discretion reduce that demand to a reasonable time, and makes use of the statute of limitations as a proper rule to go by in the exercise of that discretion.

(1) So *Fisher* v. *Wigg*, 1 *Cox's P. W.* 14. note 1. *Owen* v. *Owen*, *post.* 494. *Heathe* v. *Heathe*, *post.* 2 vol. 122. *Haws* v. *Haws*, *post.* 3 vol. 525. *Stones* v. *Heurtly*, 1 *Ves.* 165. *Har. Co. Litt.* 190. *b. n.* 4. *Gaskin* v. *Gaskin*, *Cowp.* 657. See *Rigden* v. *Vallier*, *post.* 3 vol. 731. *Jolliffe* v. *East*, 3 *Bro. Cha. Rep.* 25. In *Campbell* v. *Campbell*, 4 *Bro. Cha. Rep.* 15. the words *unto and amongst* the children, *&c.* were held to create a tenancy in common.

(2) *Reading* v. *Royston*, 2 *Salk.* 423. *Storey* v. *Windsor*, *post.* 2 vol. 632. *Fairclaim* on dem. of *Epsom* v. *Shackleton*, 5 *Burr.* 2604. *Doe* ex dem. *Fisher* v. *Prosser*, *Cowp.* 217.

Owen v. *Owen*.

March the 2d, 1738.

Caſe 236.

A. deviſes all the reſidue of her eſtate to her two nieces *Mary* and *Elizabeth*, daughters to her nephew *William Owen*, and *Anne* his wife, whom ſhe deſires to be truſtees for their children, to take care of their legacies, and then ſays, *My will is, that my eſtate be equally divided between Mary and* Elizabeth, *whom I appoint my executrixes accordingly*. One of the nieces died in the life of the teſtatrix, and all the next of kin had ſmall legacies, except one.

The deviſe to the two nieces is not a jointenancy, for the words *equally divided*, though not annexed to the clauſe which gives the reſidue, can relate to that only, and if they had been both living at the death of the teſtatrix, they would have taken as tenants in common.

THE teſtatrix, after ſeveral legacies, bequeaths in theſe words, "All the reſt and reſidue, &c. I give and bequeath to my two nieces *Mary* and *Elizabeth*, daughters to "my nephew *William Owen*, and *Anne* his wife, whom I deſire to be truſtees for their children, to take care of their "legacies for them, they being of tender age, and my will "is, that my eſtate be equally divided between my two nieces, "*Mary* and *Elizabeth*, whom I nominate and appoint my "executrixes accordingly."

One of the nieces died in the life of the teſtatrix.

The queſtion was, Whether *William Owen*, and *Anne* his wife, ſtand in the light of truſtees of a moiety of the reſidue for the next of kin, and whether the teſtatrix was to be conſidered as dead inteſtate in reſpect to that moiety, or whether the deviſe to the two nieces was a jointenancy, and *William Owen* and *Anne* his wife are truſtees for the ſurviving niece only.

N. B. *All thoſe who were next of kin, and intitled under the ſtatute of diſtributions, had ſmall legacies left them, except one.* [495]

For the plaintiffs the next of kin were cited, the caſes of *Page* v. *Page* before Lord Chancellor *King*, 2 *Wms.* 489. and *Holderneſs* v. *Rayner*, before Lord *Hardwicke*.

Mr. *Brown*, for the defendant the ſurviving niece, urged the rule of civil law, that where heirs were inſtituted (which words are of the ſame import as legatees in our law), and one dies, the legacy goes to the reſt by way of accretion, becauſe the ſame perſon cannot die teſtate and inteſtate as to the ſame thing: he relied much on the authority of *Hunt* v. *Berkley*, at the Rolls the 24th of *June* 1731, before Sir *Joſeph Jekyll**.

Lord

* *Mary Berkeley* poſſeſſed of a perſonal eſtate on the 8th of *December* 1720, made her will, whereby ſhe gave both ſpecific and pecuniary legacies to her brother *Francis Woolmer*, and to her two ſons in law the defendants, and likewiſe gave legacies to a child of each of them, and alſo legacies to other perſons, and then gives all her reſt and reſidue of her perſonal eſtate to her before-mentioned brother and two ſons in law, to be equally divided among them, and makes them executors. In *January* 1722, *Francis Woolmer* died, afterwards in *March* 1725 the teſtatrix died. The queſtion was, Whether the third part of the *reſiduum* deviſed to *Francis Woolmer*, ſhould go to the next of kin, or to the ſurviving executors, and the Maſter of the Rolls decreed for the executors (1).

(1) It ſeems that if there be a jointenancy, created by a will, and it happens, by whatever cauſe, that one of the joint tenants is prevented from taking. The

Owen v. Owen.

Lord Chancellor: The first question that hath been made in this cause is, Whether these two nieces, if they had survived the testatrix, would have been tenants in common.

Though the words *equally to be divided* in a strict settlement at common law have never been determined, barely of themselves to make a tenancy in common, yet it is settled they do so in a will, both with regard to real and personal estate.

It is clear to me, that, if both of the nieces had been living, the words *to be equally divided* would certainly have made a tenancy in common; for though, as hath been truly said, these words in a strict settlement at common law have never been determined barely of themselves to make a tenancy in common, yet in a will it is settled that these words will make a tenancy in common, both with regard to real and personal estate (1).

The only distinction attempted by the defendant's counsel in this case is, that the words *equally divided* are not annexed to the clause that gives the residue, and therefore must be relative to the subsequent clause which nominates the two nieces executrixes.

The interest and authority of executors is joint, and cannot be divided into distinct powers, but they may be so appointed as that their authority may commence or determine at different times.

But the construction would be absurd, because as executors there can be no division of their interest, or authority, for though a man may appoint executors in such a manner, that their authority may commence or determine at different times, yet he cannot nominate persons executors, and confine one of them to one branch of his estate, and another to another, for they have a joint authority, which extends to the testator's whole estate, and cannot be divided into distinct and separate powers, and therefore these words must be applied to the gift of the beneficial interest: If therefore they are tenants in common, what is the consequence of the death of one in the life of

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the testatrix? Why, clearly where it is either a pecuniary legacy, or of a real estate, that is given to two persons, to be equally divided between them, and one of them dies in the life-time of the testatrix, it is a lapsed legacy, and the share of the person so dying in the present case ought to be considered as such.

The next question is, Whether this shall go to the surviving executrix, or be distributed amongst the next of kin, as an undisposed moiety.

The legal interest in a *lapsed legacy* is in the executor, but the beneficial in the *next of kin* of the testator.

There are two things to be considered in regard to this moiety, the legal interest, and the equitable interest. By the maxims of law, a legal interest of a lapsed legacy certainly passes to the executor; but in the judgment of this court the trust and beneficial interest is given likewise, and according to the cases determined here since *Foster* and *Munt*, in 2 *Vern.* 473. must go to the next of kin, tho' in all those cases, the legal interest was unquestionably allowed to be in the executor.

Page v. *Page* in 2 *Wms.* 489. is a strong case, *Where one* devised the residue of his personal estate to six persons, to each a

The whole will vest in the survivor after the testator's death. *Pring* v. *Clay*, 2 *Cha. Rep.* 187. *Humphrey* v. *Tayleur*, *Amb.* 136. *Dowset* v. *Sweet*, *ibid* 175 *Freeman* v. *Relfe*, 2 *Bro. Cha. Rep.* 220. *Baldwin* v. *Johnson*, 3 *Bro. Cha. Rep.* 455. *Buffar* v. *Bradford*, *post.* 2 vol. 220.

(1) See *Prince* v. *Heylin*, *ante*, 493. and the cases cited in the note.

fixth part, and made them executors, and one of them dying in the life-time of the teftator, Lord Chancellor *King* was of opinion the legacy did not furvive, and decreed his fhare to the next of kin: this cafe, on the 29th of *Auguft* 1734, was cited before Lord *Talbot*, and followed by him, and by me afterwards in the cafe of *Holdernefs* v. *Reyner*. **Owen v. Owen.**

Sir *Jofeph Jekyll* late Mafter of the Rolls, in *Hunt* v. *Barkley*, differed intirely from *Page* v. *Page*, but this is only one cafe againft many, and the reafon he went on there is not fufficient to fupport the doctrine of that cafe; for the next of kin in this refpect are fimilar to an heir at law, and as he does not take by the intention of his anceftor, but in his own right by act of law; fo with regard to the perfonal eftate, the next of kin take it in like manner in fucceffion *ab inteftato*, and not by the intention of the teftator, but as caft upon them by the law: Therefore I am of opinion the plaintiffs are intitled to a diftribution (1).

As an heir does not take real eftate by the intention of his anceftor, but *by act of law*, fo with regard to perfonal, the next of kin take in fucceffion *ab inteftato*, and not by the intention of the teftator.

William Owen and *Anne* his wife, the father and mother of the two nieces, are no more than natural guardians to take care of this legacy, for they cannot be in law truftees, unlefs fome intereft in the thing given were actually vefted in them.

No perfon can be a truftee in law, unlefs he has a vefted intereft in the thing given.

(1) So *Bagwell* v. *Dry*, 1 *P. W.* 700. *Page* v. *Page*, 2 *P. W.* 489. 2 *Stra.* 820. S. C. *Peat* v. *Chapman*, 1 *Vef.* 542. See *Man* v. *Man*, 2 *Stra.* 905. *Cheflyn* v. *Crefwell*, 6 *Bro. P. C.* 1.

Partridge v. *Pawlet*. **February the 26th, 1736.**

Vide title *Executors and Adminiftrators, under the Divifion, What fhall be Affets.*

Vide title *Partition.*

C A P. LXII. [497]

Jointure.

Vide title *Dower and Jointure.*

C A P. LXIII.

Judge.

Ex parte Lingood. ***May* the 12th, 1742.**

Vide title *Bankrupt, under the Divifion, Rule as to a Certificate from Commiffioners to a Judge.*

C A P. LXIV.

Landlord and Tenant.

March the 2d, 1738.

Benjamin Charlewood, —— —— Plaintiff.
The Duke of *Bedford*, *Smith and Bever*. —— Defendants.

Case 237.

The bare entry of a steward in his lord's contract book with his tenants, is not an evidence of itself, that there is an agreement for a lease between the lord and a tenant.

THE plaintiff as assignee of a lease, being intitled, during the remainder of a term therein, to a house in *Covent-Garden*, with offices, and also to a stable and coach-house, with a room over the same, and to the use of the yard adjoining to the coach-house, the defendant *Smith*, the late Duke of *Bedford*'s steward, and the plaintiff, who was desirous to continue in the house beyond the term in the said lease, on the 26th of *May* 1731 came to an agreement, that in consideration of the plaintiff's surrendering the stable and coach-house, with the room over the same, and his right to the yard, in order to accomodate Mr. *Rich*, who was then building a new play-house he should have 30*l.* allowed him for the then remainder of the term therein, and have the same term in the residue of the premisses made up to him 21 years from that day at 60*l. per ann.* and that a lease should be executed to the plaintiff accordingly, and for which he should pay the Duke 80*l.* which agreement he delivered *Smith* to be entered in his Grace's contract book with his tenants; that some short time after, Mr. *Rich* entered [498] into and possessed the stables, coach-house, *&c.* and took down and demolished part thereof to build his play house.

Smith, on the death of the late Duke, being continued steward, declared to the plaintiff that he must stand to the agreement, and should have a further lease according to the terms of that agreement, on which the plaintiff began to repair and fit up the house, and laid out several hundred pounds in needful repairs, and alterations, beyond what he was obliged to by any covenants in the old lease.

At *Lady Day* 1736 the lease expired, and no new one hath been made to the plaintiff according to the agreement, though he has offered to pay the fine; but the defendant the Duke of *Bedford* doth not only refuse to make a new lease to the plaintiff, but hath actually made a lease of the said premisses to the defendant *Bever*, and given the plaintiff notice to deliver the possession, or to pay double rent.

The bill therefore is brought to have such further lease decreed him, and the sum of thirty pounds paid him, and that if the defendant *Smith* made the agreement without sufficient authority, that he may make satisfaction to the plaintiff for the damages he may sustain thereby.

The Duke of *Bedford* by his plea, which on arguing was ordered to stand for an answer, insisted that by the statute of frauds and perjuries, " All leases, *&c.* or term of years, or any un-

" certain

" certain interest in any messuage, lands, &c. made by parol " *and not put in writing, and signed by the parties* so making the " same, or their agents, lawfully authorized by writing, shall " have the force and effect of leases at will only, and shall not " either in law or equity, be deemed or taken to have any other " or greater force or effect, *any contract for* making any such " lease, or any former law to the contrary notwithstanding;" and avers that the pretended agreement for a lease to be made to the plaintiff of the premisses, *was not put into writing and signed by the defendant*; and doth also aver that the same was not signed by his late brother in his life time, *or by any agent* of his brother, or himself, *thereunto lawfully authorized by writing*, and that if the agreement was made by *Smith*, the same was never approved of by his brother (1), nor himself, nor did the plaintiff make any application for the lease, till the defendant had directed a lease to be made to *Bever*, and which he admitted he made in *June* 1733, to commence from the expiration of the former lease at *Lady-day* last.

And the defendant, the present Duke, by his answer, insisted that the agreement, though *reduced into writing*, yet was made subject to the late Duke's approbation, and had been never approved by him, or signed by him, or any agent of his lawfully authorised, nor by the plaintiff or the defendants.

Lord Chief Baron *Comyns* sitting for *Lord Chancellor*; I cannot see that *this* agreement should be carried into execution, though, to be sure, there are cases where agreements have been carried into execution, which have not literally pursued the statutes of frauds and perjuries. [499]

In this case there does not appear to be any certain agreement between the parties, for the bare entry of a steward in his lord's contract book with his tenants, is not an evidence of itself that there is an agreement for a lease between the lord and one of his tenants, unless it is supported by other proof.

Where the plaintiff has brought a bill for a specifick performance of an agreement, and declines, as the present does, reading the answer of the defendant, it is a strong suspicion that the answer does not come up to the case he would make by his bill.

It does not appear whether this is a true copy of the writing that is entred in the contract book, but may be only heads for an agreement; and in a case a lessor, by writing an agreement for a lease in a book, should be said to substantiate the lease, it would be giving too large a power to him, and would intire-

(1) The duke admitted that his late brother by writing authorized *Smith* and another to manage and let his estates, they acquainting and laying before him such transactions *for his approbation*. *Reg. Lib. A.* 1738. fol. 162.

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CHARLEWOOD v. The Duke of BEDFORD.

A performance only on one side is not a dispensation of the statute of frauds and perjuries, but casus omissus, against which there is no provision.

ly frustrate the design of the statute of frauds, *&c.* for it would be too great a temptation to perjury (1).

It was urged by the plaintiff's counsel, that if an agreement be made in part, and executed on one side (2), that this is a foundation for equity to establish the agreement, especially where there has been an expence to one of the parties (3).

But in all cases where there is a performance only of one side, that is not a dispensation of the statute, but *casus omissus*, against which there is no provision made.

The court declared that the plaintiff ought to be relieved against the payment of the double rent, and ordered the injunction granted for stay of the defendant's proceeding at law for double rent to be continued; and that the plaintiff's bill, as to all other matters, be dismissed without costs, except as to the defendant *Bever*, and as to him with forty shillings costs (4).

(1) But in *Allan* v. *Bower*, 3 *Bro. Cha. Rep.* 149 a lessor made a verbal promise to his lessee to secure him in the possession of the premisses during the lessee's life. In consequence of the promise, the lessee made considerable alterations and improvements. After the lessor's death a *memorandum* of this promise was found among his papers, wherein he hoped the same would be observed. *Lord Thurlow* held, that the *memorandum* took the case out of the statute of frauds, and directed a lease to be made to the lessee for 99 years determinable on his life.

(2) See *Attorney General* v. *Day*, 1 *Vef.* 221 *Potter* v. *Potter*, 1 *Vef.* 441 *Whitchurch* v *Bevis*, 2 *Bro Cha. Rep.* 559. *Vide post.* 3 vol 4 note 1.

(3) So *Allan* v. *Bower*, 3 *Bro. Cha. Rep.* 149.

(4) *Reg. Lib. A.* 1738. *fol.* 362.

C A P. LXV.

Lapsed Legacy.

Vide title *Conditions and Limitations.*

Vide title *Jointenants and Tenants in Common.*

C A P. LXVI.

[500]

Lease.

Vide title *Statute of Frauds and Perjuries.*

CAP. LXVII.

Legacies.

(A) *Of vested or lapsed Legacies being to be paid at a future Time or certain Age, to which the Legatees never arrived.*

(B) *Where Legatees shall, or shall not, have Interest.*

(C) *Of Specifick and Pecuniary Legacies, and here of abating and refunding.*

(D) *Ademption of a Legacy.*

(E) *Of a Lapsed Legacy, by Legatees dying in the Life-time of the Testator, and here in what Cases it shall be good, and vest in another person to whom it is limited over.*

(A) *Of vested or Lapsed Legacies being to be paid at a future Time, or certain Age, to which the Legatees never arrived.*

Trinity Vacation, 1737.

Atkins v. *Hiccocks.*

S. C. cited 1 Ves. 5, 44. 2 Ves. 201.

Case 238.

A testator devises to his daughter *E. H.* 200 *l.* to be paid her at the time of marriage, or within 3 months after, provided she marry with the approbation of his two sons. *E. H.* died after twenty-one, but without being married. Bill brought by her representative for the legacy.

A Testator devises in these words, " I devise to my daugh-" ter *Elizabeth Hiccocks*, the sum of 200 *l.* to be paid her " at the time of her marriage, or within three months after, " provided she marry with the approbation of my two sons " *William* and *Samuel Hiccocks*, or the survivor of them; and my " will is, that my said daughter *Elizabeth* shall yearly receive, " and be paid, until such time as she shall marry, the sum of " twelve pounds, free and clear of all taxes and impositions " whatsoever." And willed, that his leasehold estate called , should stand charged with the payment of the said 12 *l.* **per ann.* and likewise with the payment of the 200 *l.* when the same should become due, and devised the said leasehold premisses, and his whole personal estate, to his two sons, and made them his executors.

[*501]

Elizabeth died after 21, but without being married; and the present plaintiff, as her administrator, brought a bill against the executors of *Hiccocks* for the 200 *l.*

The general question, Whether the legacy vested in *Elizabeth*, and whether it so vested as to be transmissable to her administrator?

Lord

Atkins v. Hiccocks.

Lord Chancellor: I am of opinion this was not a vested legacy; in the common cases of legacies to be paid at the age of 21, there is a certain time fixed, not to the thing itself, but to the execution of it, and the time being so fixed, must necessarily come: but when the time annexed to the payment is merely eventual, and may or may not come, and the person dies before the contingency happens, I can find no instance in this court, where it has been held that the legacy at all events should be paid. The rule as to the vesting is founded upon another rule, *certum est quod certum reddi potest*, and it is plain that the testator did not regard the point of time, but the fact that was to happen, *the marriage*, which makes it a legacy on a condition, and cannot be demanded till the condition be satisfied.

It has been argued by Mr. Attorney General, that this bequest differs not from a legacy given *to be paid at* 21, which vests immediately, and the time of payment only is postponed.

But it has been always held, with regard to such a limitation of payment at 21, that it is *debitum in præsenti, solvendum in futuro*, and the payment postponed merely on account of the legatee's legal incapacity of managing his own affairs till that age; and this has been the established rule of this court ever since *Cloberie's* case, 2 *Ventris* 342.

In the *Digest*, *lib.* 35. *tit.* 1. *lex* 75. *de Conditionibus*, &c. it is held that *dies incertus conditionem in testamento facit*, and these are the words of the text, and not of the commentator; so that a time absolutely uncertain is put on the same footing as a condition; but as the civil law is no further of authority than as it has been received in *England*, let us see what our own authors say. *Swinbourn*, *part* 4. *sec.* 17. *page* 267. *old edition*, makes a difference between a certain and an uncertain time, and lays it down, that if a legacy is given to be paid at the day of marriage, and the legatee die before, the legacy is lost. *God. Orp. Leg.* 452. is to the same effect.

It has been insisted, that the testator's giving 12 *l. per ann.* to *Elizabeth* till the contingency of her marriage, is in the nature of interest for the 200 *l.* and that from thence it appears to be his intention, that the legacy should vest in the mean time (1); but whenever this doctrine has been allowed, the payment of the principal hath been certain, and so not similar to the present case, because here this is not meant as interest, for it is an annuity of 12 *l. per ann.* charged upon, and issuing out of an estate.

[502] The case in 1 *Salk.* 170. *Thomas* v. *Howell*, was plainly a condition subsequent, and being made impossible by the act of God, it was adjudged that the condition was not broken, and consequently should not devest the estate out of the devisee.

(1) See *Fonnereau* v. *Fonnereau*, *post*. 3 vol. 645. *Dodson* v. *Hay*, 3 *Bro. Cha.* 404.

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ATKINS v. HICCOCKS.

The second point is very strong against the transmissableness, which is her marrying with the consent of her two brothers, and shews plainly the testator intended a condition precedent, *that if she married she was to have* 200 *l. for her portion*; but if she died before, there was no occasion to have it raised for the benefit of a stranger.

In all cases, where the condition of marrying is annexed, it is necessary there should be marriage to vest the legacy (1).

It is true indeed, as there is no devise over, the clause of consent might be only *in terrorem*, but in all cases, where the condition of marrying is annexed, it is necessary that the condition, as to the marrying at least, should be performed, though she is not obliged to marry with consent.

I am the more satisfied, because it appears to be the intention of the testator, that this 200 *l.* should be in the nature of a marriage portion, for he has taken it out of a leasehold estate; and if she did not marry, it was manifestly his design that it should sink in that estate for the benefit of his sons: therefore I think this bequest is to be considered as a condition precedent, which not being performed, the legacy did never vest, and consequently the administrator can make no title to it. The bill dismissed.

(1) *Garbut* v. *Hilton*, *ante*, 281. *Elton* v. *Elton*, *post*. 3 vol. 504. 1 *Wils.* 159. S. C. 1 *Ves.* 4 S. C. *Hemmings* v. *Munkley*, 1 *Bro. Cha. Rep.* 303.

Hall v. *Terry*.

November the 8th, 1738.

Case 229.

S. C. cited 1 Ves. 44. 2 Ves. 202. Com. 718. S. C. 8 Vin. Abr. 383 pl. 36.

M. T. being intitled to the reversion of an estate after the death of his wife devised it to *C. D. and his heirs, so as he should pay to his sister Elizabeth Oades* 100 *l.* within six months after the reversion came into his possession.

Elizabeth Oades died in the life-time of the wife, and *Elizabeth*'s representative brings the bill against *C. D.* for the 100 *l.*

The legatee dying before the time for raising the 100 *l.* was come, her representative is not intitled (1).

MICHAEL *Terry*, being intitled to the reversion of an estate after the death of his wife, "devised it to *C. D.* "and his heirs, so as he should pay to his sister *Elizabeth Oades* "the sum of one hundred pounds, within six months after the "reversion came into his possession (2), and *devised the rest and* "*residue of his personal estate, all his debts and legacies before* "*bequeathed being first deducted, to* C. D. and another, whom "he made his executors."

(1) It appears from a MSS. report of this case that the testator *charged* the said manors, &c. with the payment of said 100 *l.* and after giving several pecuniary legacies, gives the rest and residue of his *real* and personal estate, his debts and legacies being *thereout* first allowed, &c.

(2) Lord *Thurlow* in *Godwin* v. *Munday*, 1 *Bro. Cha. Rep.* 191. disapproves of this case: and observes that it cannot be reconciled with *Lowther* v. *Condon*, *post*. 2 vol. 127. The same remark seems to apply to other cases, as particularly to *Emes* v. *Hancock*, *post*. 2 vol. 507. *Hutchings* v. *Fry*, *Com.* 716. *Sherman* v. *Collins*, *post*. 3 vol. 319. *Tunstall* v. *Bracken*, *Amb.* 167. 1 *Bro. Cha. Rep.* 124. S. C. *Jeale* v. *Titchener*, *Amb.* 703. *Hodson* v. *Rawson*, 1 *Ves.* 44.

Elizabeth

Hall v. Terry.

Elizabeth Oades died in the life-time of the wife, and she likewise being now dead, the representative of *Elizabeth Oades* brings this bill against *C. D.* to have the 100 *l.* paid to him.

Mr. *Fazakerley* for the plaintiff insisted, that this is a vested legacy, and that the legatee might have assigned it, or released it; and if it was transmissable in her life-time, it is, after the death of legatee, equally transmissible to her representative, and was not intended as a contingent payment, but the time
[503] of payment only was postponed. He relied chiefly on the case of *King* v. *Withers*, *T.* 1735. *Cas. in Eq.* in the time of Lord Chancellor *Talbot*, 117. but if the court should be of opinion against the plaintiff in this point, he submitted it, that the 100 *l.* might be raised out of another fund, the personal estate, as the defendant allows he has assets in his hands, and that by virtue of the last words in the will, all his debts and legacies before bequeathed being first deducted, it was an original charge on the personal estate, and therefore ought to follow the ordinary rule of pecuniary legacies.

The *Attorney General* for the defendant insisted, that, on the face of the will, it is plainly no legacy, but only a charge upon the estate, and is nothing more than a gift of the real estate, so as the devisee pay such a sum of money; that a charge upon a real estate was never subject to the jurisdiction of the Spiritual court, and by their rules it is a vested legacy only that is transmissible to the representative; that the law does not look upon a charge on a real estate, as a vested legacy till the day of payment comes, and this court have always governed themselves, in these cases, by the authority of *Pawlet* v. *Pawlet*, 2 *Ventr.* 366, 367.*

Mr. *Brown* of the same side said, to make the personal estate liable, this legacy ought to be a general charge, which is not the present case, because it is particularly charged upon a real estate, which has never been construed a legacy, but merely a testamentary gift, by imposing terms and conditions on the person who takes the estate.

Where there is an absolute legacy, and the future time *must* come for the payment, by the civil law, it is transmissable, but here are no words that can make a gift of the money, nor can he claim it as absolutely given, for it is only annexed as a condition to a devise of lands to another person, and he relied on the case of *Carter* v. *Bletsoe*, 2 *Vern.* 617 †.

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* A term limited by a settlement to raise portions for younger children payable at 21, or marriage; one of them dies under 21, and unmarried, her portion shall not be raised for the benefit of the administratrix.

† *A.* devises lands to *B.* his son and his heirs, and declares, that out of the lands he shall pay 200 *l.* to his daughter at her age of 21. she marries and dies under age. *Per cur.* There is no vesting clause in the will, the direction, that the son pays to the daughter at her age of 21, vests nothing until she attains 21, and she dying before, it never arises.

Lord

Lord Chancellor: These are cases upon which there have been great variety of determinations, and they are not very easily to be distinguished. Hilary Term.

The question is, Whether the plaintiff is intitled to have the 100*l.* paid to him which is given under the will of *Michael Terry* to *Elizabeth Oades*.

*The general rule is, where money is given to be paid out of a real estate at a future time, that if the person dies before the time, it shall sink into the estate, and this has been established ever since the case of *Pawlet* v. *Pawlet*, in 2 *Ventr.* and so likewise as to personal estate, where the time of payment is annexed to the legacy, if the person dies before the time, it cannot be raised.

Where money is given to be paid out of real estate at a future time, if the person dies before the time, it shall sink in the estate; the same as to personal estate, where the time of payment is annexed to the legacy.

There are other legacies under the will of the testator, to which the words, *his legacies before bequeathed being first deducted*, are properly applicable, and therefore no argument can be drawn from hence, that the 100*l.* was intended as an original charge upon the personal estate. [*504]

It is insisted by the plaintiff's counsel, that the legacy is vested, and only the time of payment postponed for the convenience of the estate, as it was a dry reversion.

But I am of opinion, that the gift of the sum of money is only by the direction for the payment, and that it cannot be said this is an original gift, so as to vest the legacy, and the payment only postponed to a future time.

Another distinction has been attempted, that the time of payment was not taken from the nature of the legacy, or the circumstances of the legatee, but from the nature of the estate, and that therefore *this* is different from all the cases (1).

But I doubt, if I should give into this reasoning, I should overturn the cases of portions, or of other sums bequeathed: for of late years it has been held, that where a sum of money is given by way of portion, or as a general legacy, charged upon land, if the party dies before the time, it cannot be raised.

Whether a sum of money be given as a portion, or as a legacy, if charged upon land, and the party dies before the time, it cannot be raised (2).

In the present case here is no contingency, the time is single within 6 months after the death of tenant for life, when the reversion came into possession, so that it never could be raised, because the person died before the time for raising.

As to the case of *King* v. *Withers*, Lord *Talbot* said, that though the contingency, on which the sums there given were payable, had not happened, yet that the time on which these sums were directed to be paid, had happened, and therefore held *them* to be vested.

(1) See *Lowther* v. *Condon*, *post*. 2 vol. 129.

(2) See *Prowse* v. *Abingdon*, ante, 482. and *Sherman* v. *Collins post*, 3 vol. 319.

Hall v. Terry.

A trust upon lands for raising and paying a sum of money, within six years after the death of the father, to the second son, who dying within the time, construed to be for maintenance only and not transmissable.

The case of *Bright* v. *Norton*, determined by Lord *Talbot*, is a very strong authority in the present case; *that was a trust upon lands, for raising and paying a sum of money, within six years after the death of the testator, to the second son, who died within the time, held to be intended for his maintenance only, and not transmissable to his executor, unless he had lived to the end of the six years* (1).

Upon the whole, I must direct the bill to be dismissed, but without costs.

(1) In a MSS. report Lord *Hardwicke* is reported to have said, "*Brighton* v. *Norton* is a strong case; but "what I ground myself upon is, that the "direction of payment is the *gift*, and "she dying before, there is no gift." *Vide etiam.* 1 *Vej.* 48. 1 *Bro. Cha. Rep.* 124. note.

[505]

(B) *Where Legacies shall, or shall not have Interest.*

Michaelmas Term, 1737.

Palmer v. *Mason.*

Case 240. *A.* gave 500*l.* to his grandaughter to be paid at 21, or marriage, and if she died before either contingency, then it is devised over to *B.*

JOSEPH Palmer by will gave 500 *l.* to his grandaughter, *to be paid at 21, or day of marriage*, and if she died before either of the contingencies happened, then the testator devises the legacy over to another.

Bill brought for interest upon the legacy, and to secure the principal.

A bill brought for interest upon the legacy, and that the principal may be secured to the plaintiff, who is an infant, till the contingencies happened, the case of *Acherley* v. *Vernon*, in 1 *Wms.* 783. was cited for this purpose.

As it is given over, nothing vests in the grandaughter, and therefore neither intitled to interest, nor to have the principal secured.

Lord Chancellor: I am of opinion, as the legacy is given over, that nothing vested in the grandaughter the legatee, and that she is not intitled to interest, or to have the principal secured (1).

There was another point in the cause between a specifick devisee of land under the will, and the heir at law of the testator, whether the former shall contribute equally with the latter, in the payment of debts, where the personal estate is not sufficient.

A specifick devisee of land shall not contribute upon an average with the heir at law, towards satisfaction of creditors.

Lord Chancellor: Where there is a specifick devise of lands, the specifick legatee shall never contribute upon an average with

(1) See *Heath* v. *Perry*, *post*. 3 vol. 101, and the cases cited in the different notes there.

the

the heir at law towards satisfaction of creditors, while the real assets of the heir are sufficient (1). Palmer v. Mason.

(1) See *Galton* v. *Hancock*, *post.* 2 vol. 424.

Green v. *Belchier*. *January the 28th, 1737.*

Case 241.

On settlement before marriage, a proviso, that if a husband and wife die, leaving issue unprovided for, that then the trustees might enter upon an estate, and take the rents thereof, till they had received 200 *l.* for the benefit of such unprovided children, in such manner and proportion, as the survivor of the husband and wife should appoint: The wife survived, and appointed the 200 *l.* for a daughter, the plaintiff's wife being an unprovided child: bill brought to have the 200 *l.* raised.

Sir *Joseph Jekyll* decreed the 200 *l.* and interest by way of maintenance, from the death of the mother; defendant appealed from that part which allows interest, and decree affirmed.

ON the intended marriage of *Henry Paine*, the *Castle Inn* at *Kingston* was vested in trustees, and the trust thereof declared to one *Elizabeth Stidd* for life, remainder to *Anne Payne*, mother of *Henry Payne* for life, remainder to *Henry Payne* for life, remainder to his intended wife for life, remainder to his first and other sons in tail: And in the deed of settlement there is a proviso to this effect, that if *Henry Payne* and his wife should die, leaving any issue unprovided for, that then it should be lawful for the trustees to enter and receive the rents and profits of this estate, until they had received the sum of 200 *l.* and the *premisses are afterwards declared to be chargeable, and to stand charged with the raising this sum, for the benefit of such children so unprovided for, in such manner, and in such proportions, as the survivor of the husband or wife should appoint: The wife survived the husband, and, according to the power under the proviso, appointed the 200 *l.* to be paid to her daughter the wife of the plaintiff, the only child *not provided for* in the life of the father and mother.

[*506]

The bill was brought against the defendant, who purchased the premisses of the eldest son of the marriage, in order to have the 200 *l.* raised.

The Master of the Rolls (a) decreed the principal sum of 200 *l.* to be raised for the plaintiff, and likewise interest by way of maintenance for the plaintiff's wife from the time of the death of the mother, which happened about a year before the filing of the bill.

(a) Sir *Joseph Jekyll.*

From that part of the decree relating to the allowance of interest, the defendant appealed to *Lord Chancellor*.

Lord Chancellor: The defendant in this case, being a purchaser with notice of the charge upon the estate, is to be considered in the same light, as if the bill had been brought against the person under whom he claims.

The question in this case will be, Whether the 200 *l.* is to be considered as a sum to be raised by receipt of the annual rents and profits, or as a sum in gross by a determinate time.

It is plain by the settlement, that this 200 *l.* was intended for the children's portions, and what is material too, for such as were otherwise unprovided for, and therefore if no maintenance

was

GREEN v. BALCHILD.

was allowable in the mean time, the estate not being above 50 *l.* *per ann.* the 200*l.* must necessarily be exhausted greatly in bare subsistence of such children, before the whole sum could be raised.

Where the words are rents and profits, unless other words to make it annual, the court have always made a liberal construction, in order to obtain the end which the party intended by raising the money, have allowed a sale.

Such a construction therefore ought not to be made, unless the words are extremely plain, which is not the present case: That part of the proviso, impowering the trustees to enter and receive the rents, *&c.* seems to mean the annual rents and profits, though in general, where money is directed to be raised by rents and profits, unless there are other words to restrain the meaning, and to confine them to the receipts of the rents and profits as they accrue, the court, in order to obtain the end which the party intended by raising the money, has, by the liberal construction of these words, taken them to amount to a direction to sell, and as a devise of the rents and profits will at law pass the lands, the raising by rents and profits, is the same as raising by sale (1).

The subsequent words, by which the premisses are declared to be charged with this 200 *l.* if they stood alone, would certainly warrant a sale or mortgage (2), and they ought certainly to have their proper force, and ought not to be controlled by the preceding words, supposing them to mean annual rents only.

[507]

The appointment of the 200 being in such manner and proportions, as the survivor of the father and mother shall think fit, the father or mother might have made it payable at any time.

Where a legacy is given by a father to a child as a provision, though payable at a future day, yet the child has an immediate right to the interest of the money. otherwise, if legatee be a stranger to testator.

(a) Prec. in Chan. 583. and 2 Wms. 13.

The words of the appointment of the 200*l.* being in such manner, and in such proportions, as the survivor of the father and mother shall direct, are very material, for these words not only include a power of raising it by mortgage or sale, but a certain *discretionary time for raising it*, and as there is no time limited by the settlement for payment of the money, the father or mother might no doubt have made the 200*l.* payable at any time, as at the age of 21, or marriage, and in such case interest by way of maintenance would certainly be allowable in the mean time; it being a constant rule in equity, that wherever a legacy is given by a father to a child, as a provision for such child, though the legacy be payable at a future day, yet the child has an immediate right to the interest of the money (3); if the legatee was *a stranger* to the testator, it would be otherwise. In the case of *Ivy* v. *Gilbert* (*a*), there were no words declaring the premisses to be charged with, *&c.* as in the present, and yet it was held even there, that the words, rents and profits would in general warrant a sale, though it did not in that particular case, by reason of the subsequent words restraining the manner of raising the money, by leases for one, two or three lives, or for any number of years determinable thereon, or for 21 years absolutely at the old rent.

The decree affirmed (4).

(1) See *Trafford* v. *Ashton*, 1 *Cox's P. W.* 418, note 1. *Ivy* v. *Gilbert*, 2 *Cox's P. W.* 19. *n.* 1. *Okeden* v. *Okeden*, *post.* 550.

(2) See *post.* 2 vol. 42.

(3) See *Heath* v. *Perry*, *post.* 3 vol. 102. note. 2

(4) *Reg. Lib. A.* 1737. fol. 289.

(C) *Of Specifick and Pecuniary Legacies, and here of abating and refunding.*

Palmer v. *Mason.*

Vide this Case in the Division immediately preceding.

Lawson v. *Stitch* (1). *May the 5th, 1738.*

Case 242.

JOHN Lawson by will dated the 20th of *July* 1733, amongst other legacies, devised to the defendant 500*l.* to remain and continue at interest on such securities, as he should leave at the time of his death, or to be put out on government securities at the election of his executors.

It appeared in fact, that the testator had a mortgage for the principal sum of 500 *l.* on the estate of one Mr. *Pope*, and that he had no other sum out at interest, and it was insisted by the defendant, that he had several times declared that he would leave him the said 500*l.*

There being a deficiency of assets to answer all the other legacies given by the will, the question is, If this is a specifick legacy? for if it is, it would not be liable to any proportionable abatement, with the other pecuniary legatees.

It was insisted by the *Attorney General*, that this is a specifick legacy, that it appearing the testator had in this mortgage sufficient to answer the charge, and that too appearing to be the only security the testator had, it must be presumed he intended this legacy should be satisfied out of this mortgage; that wherever any security itself is devised, or any part of the money due on such security, such legacy is always to be taken as a specifick one, and in support of his argument, he cited the case of *Philips* v. *Carey*, at the Rolls, the 14th of *May* 1728. "There "the testator devised a legacy of 1000*l.* payable at the age of "21, or marriage, *to be retained in the hands of* Atwell (who "had money of the testator's in his hands, as his banker); "the Master of the Rolls held this legacy should not carry in-"terest, only from the time limited for payment, which is the "case always of general pecuniary legacies, but that by this "manner of devising this 1000 *l.* it was severed from the "rest of testator's estate, and specifically appropriated for the "benefit of this legatee, and that it should carry interest im-"mediately." (2. [508]

(1) *Reg. Lib. B.* 1737. fol. 299.

(2) *Lord Thurlowe* in *Ashburner* v. *M'Gwire*, 2 *Bro. Cha. Rep.* 113. said, that this case had often been denied to be law. *Vide Heath* v. *Perry*, *pe?.* 3 vol. 102. and notes.

LAWSON v. STITCH.

A devise of a sum of money in a bag, &c. is a specifick legacy and shall not abate with pecuniary legatees.

Lord Chancellor: It is pretty difficult to make pecuniary legacies specifick ones; but some such there are, as in the case of a sum of money in such a bag, the devise of a bond, or other security, or a devise of money out of such security, and in such case there can be no abatement (1).

But this seems to me by no means a specifick legacy, here is no particular charge of the legacy on this mortgage, and the election given to the executor plainly shews the testator did not intend to make the mortgage the particular fund, out of which the legacy should issue, but only gave the legatee a power of taking part of the mortgage money, if it should happen to be a subsisting mortgage at the time of his death, or if otherwise, that part of the testator's money, to the amount of 500 *l.* should be laid out in the purchase of some government security or other, to that value.

That the case at the Rolls was very different, for that was plainly a devise only of part of a debt due from *Atwell* to the testator, nor did this point come in judgment, or was it at all necessary to be determined there, the question only was, from what time the legacy should carry interest, and tho' it was held to carry interest immediately, yet it will not follow from thence it was a specifick one, but liable to an abatement with the other legacies, if any deficiency had made that necessary.

Where a particular debt is devised, and afterwards recovered by testator in an adversary way, it is an ademption of the legacy.

N. B. It was said by the *Attorney General* in this case, that where a particular debt was devised, or part thereof, and the same was recovered by the testator in his life-time, in an adversary way, that will amount to an ademption of the legacy, otherwise, if voluntarily paid off by the debtor to the testator: it was admitted by the *Chancellor* in this case, that distinction had prevailed, and that it was the practice of the court (2).

[509] *His Lordship* declared, that the 500 *l.* given to the defendant, is to be considered as a pecuniary legacy, and liable to abate in proportion with the other legatees.

(1) See *Purse* v. *Snaplin*, *ante* 414, note 1. 417.

(2) So *Orme* v. *Smith*, 1 *Eq. Ab.* 302. *pl.* 2. *Crockat* v. *Crockat*, 2 *P. W.* 165. *Rider* v. *Wager*, 2 *P. W.* 328. *Partridge* v. *Partridge*, *Ca. temp. Talb.* 228. *Sed contra Earl of Thomond* v. *Earl of Suffex*, 1 *P. W.* 464. *Ford* v. *Fleming*, 2 *P. W.* 469. *Ashton* v. *Ashton*, 3 *P. W.* 386. *Drinkwater* v. *Falconer*, 2 *Vef.* 623. *Attorney General* v. *Parkyns*, *Amb.* 566. *Ashburner* v. *M'Gwire*, 2 *Bro. Cha. Rep.* 108. *Hambling* v. *Lister*, *Amb.* 401. *Baaick* v. *Stevens*, 3 *Bro. Cha. Rep.* 431.

(D) *Ademption of a Legacy.*

Purse v. *Snaplin, et e contra.*

Oct. the 28th, 1738.

Vide title *Devises, under the Division, Of Void Devises, by Uncertainty in the Description of the Person to take.*

Graves v. Boyle.

July the 27th, 1739.

Case 243.

SIR *Samuel Garth* having, upon his daughter's marriage, entered into a bond to leave at his death 5000*l.* amongst her younger children, by will creates a term in trustees for 21 years, in trust to apply the rents and profits for a maintenance for the children of his daughter, till they came of age; by the same will he gives his personal estate in trust, to pay the produce of it to his wife during her life, and after her death to pay 1500*l.* to *A.* one of the daughters of his daughter, and to pay 3500*l.* to and among the other younger children of his daughter, in such manner as his daughter should appoint, and if she made no appointment, then equally between them at their ages of 21, or marriage, and declares his will to be, that the legacies so given to his daughter's children, shall be in full satisfaction of the bond.

Sir *S. G.* having upon his daughter's marriage given a bond to leave 5000*l.* at his death among her younger children, by *will* creates a term for years, in trust to apply the rents and profits for maintenance of his daughter's children till 21, and also gives his personal estate in trust, to pay the produce of it to his wife for life, and after her death to pay 1500*l.* to *A.* for one of the daughters of his daughter, and 3500*l.* among the other younger children of his daughter, as she shall appoint, and if no appointment, equally between them at 21 or marriage, and declares the legacies shall be in full satisfaction of the bond.

She must elect to claim under the will, or under the bond; if she claims under the latter, can take no benefit under the former.

Where a particular thing is by a will given in discharge of a demand, and the party insists on it, he must not only waive that particular thing, but all benefit claimed under the whole will (1).

The plaintiff brings her bill to have her share out of the trust of the term, and likewise her share of the 5000*l.* under the bond.

Lord Chancellor at the hearing of the cause had declared, that the plaintiff might choose to claim either under the will, or under the bond, but if she claimed under the bond, she must take no benefit at all under the will; but next day conceiving a doubt, on account of the devise being of a real estate, and the bond being a personal debt, gave orders to be attended with precedents, and this day delivered his opinion in support of his former decree, and mentioned the case of *Jenkins* v. *Jenkins*, *November* 5, 1736, before Lord *Talbot*, as a case in point, where a particular thing was given in discharge of a demand, the party insisting on his demand, it was decreed he should waive not only that particular thing, but all benefit which he claimed under the whole will. The case of *Shepherd* v. *Philips* at the Rolls, *Dec.* 15, 1738, was determined on a similar point. [510]

But at the same time the Chancellor took notice, that in the present case the devise was expressed to be in satisfaction of the bond, and when he gave orders to be attended with precedents, declared, he would not extend the construction of devises *in satisfaction* further than they had already gone. He decreed the

Lord *Hardwicke* declared he would not extend the construction of devises in satisfaction, further than they had already gone. Decreed the children born after the death of the testator should have their share under the bond.

(1) See *Bellasis* v. *Uthwatt*, *ante* 269 note.

Graves v. Boyle.

children born after the death of the testator should have their share under the bond * (1).

* *Vide* the case of *Lingen* v. *Souray*, *Prec. in Chan.* 400.

(1) See *Heathe* v. *Heathe*, *post.* 2 vol. 121.

(E) *Of a Lapsed Legacy, by Legatee's dying in the Life-time of the Testator, and here, in what Cases it shall be good, and vest in another Person to whom it is limited over.*

July the 1st, 1739.

Case 244.

Van v. *Clark.*

S. C. cited 1 Vef. 46. Com. Rep. 718.

DAME *Mary Craven*, by her will, devised "to *Godfrey* "*Clark*, his heirs, executors and administrators, *all that* "*her messuage or tenement in Great Lincoln's-Inn Fields, with* all "her furniture (pictures excepted), houshold-stuff, *&c. and* "*all her real and personal estate not otherwise disposed of*, as also "all her mortgages, stocks in the bank, or any other com-"pany, and the residue of her personal estate, not otherwise "disposed of, to the said *Godfrey Clark*, in trust for the pur-"poses herein after mentioned, *viz. to the intent that out of* "*the said real and personal estates so devised, her several legatees* "*might be paid*;" *viz.* to *Thomas Lewis* she gave 2000*l.* in trust to and for the use and behoof of his daughter *Mary Lewis*, and declared her intent to be, that the said *Thomas Lewis*, his executors and administrators, should, until the said *Mary Lewis* should attain the age of eighteen, or be married, which should first happen, place out the 2000*l.* at interest upon good security, to be approved of by the testator's sister *Jane Beacher*; and also that the said *Thomas Lewis* should from time to time put out at interest, the interest of the said sum, as the same should from time to time arise to a fit sum for that purpose, which 2000*l.* with the interest and produce thereof, the said Dame *Mary Craven* directed *Thomas Lewis*, his executors or administrators, should pay to the said *Mary Lewis*, for her own use and benefit, upon her attaining her age of eighteen, or marriage, if that should first happen, and made *Godfrey Clark* executor and residuary legatee. She likewise directed the 2000*l.* to be paid to *Thomas Lewis* the trustee, within one year and a half after her decease.

M. C. by her will devised to *G. C.* his heirs, executors, *&c.* all that her messuage in *Great Lincoln's-Inn Fields*, with all her furniture, houshold stuff, *&c.* and all her real and personal estate, not otherwise disposed of, to the intent that out of the said real and personal estates, her several legacies might be paid. And then gives to *Thomas Lewis* 2000*l.* in trust for the use of his daughter *Mary*; and he, till she attain the age of 18, or be married, to place out the same at interest, and pay it with the produce thereof to his daughter for her own use, on her attaining the age of 18, or marriage, which should first happen.

The 2000*l.* directed to be paid to *Thomas Lewis* within one year and a half after her decease, the infant dying before the time of payment to the trustee, the legacy not raisable for her representative.

Thomas Lewis died in the life-time of the testatrix, and *Mary Lewis* half a year after, unmarried. Bill brought by the representative of *Mary* to have the 2000*l.* paid to him.

Thomas Lewis died in the life-time of the testatrix, *Mary Lewis* died about half a year after the testatrix, unmarried. VAN v. CLARK.

The bill was brought by the plaintiff, as representative of *Mary Lewis*, to have the 2000*l.* paid to him.

The defendant *Godfrey Clark*, the executor and residuary legatee of Lady *Craven*, admitted personal assets sufficient to pay the 2000*l.* but submitted to the court if the plaintiff was intitled, and his counsel insisted that the house in *Lincoln's-Inn Fields* was in the first place charged with this, and that it was not a charge merely on the personal estate, but on the mixed fund of real and personal; and therefore, the legatee dying before the day of payment, it ought to sink, according to the case of *Pawlet* v. *Pawlet*, 2 *Ventr.* 366, and 1 *Vern.* 204, and 324, and *Smith* v. *Smith*, 2 *Vern.* 92. *Yates* v. *Phettiplace*, 2 *Vern.* 416. *Carter* v. *Bletsoe*, 2 *Vern.* 616. and *Prowse* v. *Abingdon*, *E. T.* 1738 *, that here was no vesting clause, only a direction to the executor to pay at a certain day; so that the time is annexed to the substance of the legacy, not merely to the day of payment. *Dyer* 59. *marginal note*. *Swinbourne* 32.

* *Vide ante* 482. pl. 229.

For the representative of *Mary Lewis* was cited the case of *Wilson* v. *Spencer*, *January* 1732, 3 *Wms.* 172, *where the testator ordered all his just debts, funeral expences, and legacies, should be discharged out of his personal estate, as far as that would go, and in default of that, ordered his executors to raise* 2000 l. *out of his real estate within twelve months after his decease, which* 1000 l. *he gave to* A. *and charged all his real estate therewith.* A. *died within the* twelve months, *and yet decreed to be raised.*

That if the trustee had received it in the present case, it must certainly have gone to the representative of *Mary Lewis*, and that it must be considered as intirely separated from the estate, and never to come back to the executor; and cited the case of *Pinbury* v. *Elkin*, 2 *Vern.* 766, and *Jones* v. *Westcomb*, *Prec. in Chanc.* 316. where a devise was held to be good, though the time of payment was uncertain, and the contingency never happened, (in opposition to the rule of civil law which had been cited *e contra*, that *dies incerta conditionem facit*) and also the case of *Corbet* v. *Palmer* (1), *February* 1734, *where the residue was to be divided among six at the death of the wife of the testator, two died before the wife, and held by Lord* Talbot *that the interest of the two who died was a vested interest, and transmissable to their representatives, and did not depend on the legatee's surviving the wife*, and *Whalley* and *Cox* (2), *March* 1736, *there* J. S. *made his will as follows: "I give and bequeath to* R. Plumer 300 l. *to be paid within three years after my decease*, to put the same out to interest, and to pay the interest and profits thereof to my niece

Residue directed by a will to be divided among six persons, at the death of the testator's wife, two died before her; held by Lord *Talbot* that the interest of the two was a vested one, and transmissable, and depended not on surviving the wife.

J. S. gives to *R. P.* 300*l.* in trust to be paid within three years after his decease to his niece *W.* for her separate use, and after her decease 200*l.* thereof to her son *T.* and the other 100*l.* to her son *C. W.* and *T.* both die within the three years. Sir *Joseph Jekyll* decreed the whole money should be paid, though charged on both funds.

(1) 2 *Eq. Ab.* 548. *pl.* 27. S. C. (2) 2 *Eq. Ab.* 549. *pl.* 29. S. C.

VAN v. CLARK.

Whalley for her separate use; and after her decease in trust to pay the interest thereof, &c. I give 200 *l.* thereof to her son *T. Whalley*, and the other 100 *l.* to her son *C. Whalley*. The mother Mrs. *Whalley* and the son *Thomas* both died *within the three years*, and yet the Master of the Rolls decreed that the whole money should be paid. It was charged on both funds, real estate as well as personal, but it was admitted *that the personal estate was sufficient*.

Lord Chancellor: The infant dying before the time of payment to the trustee, I am of opinion makes this legacy not raisable for the benefit of the plaintiff her representative.

Legacy out of personal estate payable, or given at a certain time, and interest in the mean time, is a vested one; otherwise as to legacies out of real estate, for if legatee dies before the time is come, it sinks into the inheritance. The same construction where a legacy is given out of a mixed fund of real and personal estate at a certain time, or *to be paid* at a certain time.

If a legacy is given out of a personal estate *payable* (1) at a certain time, or if given at a certain time, and *interest* (2) in the mean time, it is a vested legacy; but the rule of this court as to legacies out of real estates is otherwise, for if given at a certain time, or *payable* at a certain time, yet if the legatee dies before the time is come, it sinks into the inheritance; *so when a legacy is given out of a mixed fund of real and personal estate at a certain time, or to be paid at a certain time* (3), the construction is the same as if given out of a real estate only. There is but a slight difference between the cases of legacies given at a day, or *payable* at a day, but the distinction is adhered to only to give a consentaneous jurisdiction with the ecclesiastical courts; *nor is there any case*, that I know of, to warrant a distinction between legacies given out of a mixed fund of real and personal estate, and out of real estate only (4).

If the infant had survived the year and half, though trustee dead before, she would have been intitled to the legacy; so likewise if she had died after the time aforesaid and before 18, or marriage, her representative would have been intitled.

If the infant had survived the *year and half* (for the death of the trustee makes no distinction), it would have been extremely clear she would have been intitled to the legacy; or if she had died *after the time aforesaid*, and before eighteen or marriage, her representatives would have been intitled: but if this had been merely personal, as she died *within the year and half*, her representative could not have been intitled, for the whole gift is in the direction of the payment, which makes that the substance.

Where a legacy charged on real estate is clearly intended as a portion, the court goes as far as it can to hinder the raising it out of land for the benefit of representatives.

In the present case it is not a legacy merely out of a personal estate, but out of both funds, and the real charged in the first place by the testator's express directions, *viz. her estate in Great Lincoln's-Inn Fields*. And this construction is more agreeable to

(1) See *Steadman* v. *Palling*, *post.* 3 vol. 427.

(2) See *Atkins* v. *Hiccocks*, *ante* 501. *Fonnereau* v. *Fonnereau*, *post.* 3 vol. 645.

(3) See *Prowse* v. *Abingdon*, *ante* 482. [illegible] v. *Cotton*, *post.* 555. *Richardson* v. *Greese*, *post.* 3 vol. 69. *Attorney General* v. *Milner*, *post.* 3 vol. 112. Mr. *Cox's* note to the *Duke of Chandos* v. *Talbot*, 2 *P. W.* 612, and *Butl. Co. Litt.* 237. *a.*

(4) See *Reynish* v. *Martin*, *post.* 3 vol. 330.

the

the intention of the testatrix, as the sum was intended clearly *as a portion for Mary Lewis*: and the court always goes as far as it possibly can to hinder the raising portions out of land for the benefit of representatives, and the end of this bill is plainly for this purpose. VAN *v.* CLARK.

His Lordship dismissed the bill, but without costs.

Vide title *Conditions and Limitations.*

Vide title *Devises, under the Division, Where a Devise shall or shall not be in Satisfaction of a Thing done.*

Legacy vested. *Vide* title *Heir and Anceſtor.*

Vide title *Injunction.*

C A P. LXVIII.

Maintenance for Children.

Easter Term, 1737.

Edward Jackson, an Infant, Plaintiff.

Anne Jackson and Others, Defendants.

THE sum of 3500 *l.* had been conveyed to trustees for the benefit of *Mary* the plaintiff's mother, during her coverture, and for a provision for children; and if no issue, then the husband of *Mary*, if his necessities required it, with the approbation of the trustees, might sell the 3500*l.* (1).

Case 245. Where there is a falling of stock, without the neglect of the trustee, he is no liable to make good the deficiency, but is answerable only as far as the value, especially where it was specifick stock.

Anne

(1) The plaintiff's mother *Mary* before her marriage was possessed of 500*l.* *South-sea* stock, which according to the then price of that stock was valued at 3700 *l.* It was agreed that 3500 *l.* part of this 3700 *l.* should be settled on *Mary* and her children by the marriage. The settlement recited that *Mary* was possessed of 3500 *l.* *principal money*, for *which sum* the trustees under the settlement gave a *receipt*. But in fact no part of the 500 *l.* *South sea* stock was sold to raise this 3500 *l.* except 100 *l.* which sold for 745 *l.* out of which sum *Anne Jackson* one of the trustees retained 500*l.* in order to make up with the remaining 400 *l.* *South sea* stock the said sum of 3500 *l.* Afterwards the 400 *l.* *South sea* stock greatly fell in value Plaintiff brought his bill to have the deficiency of the 3500 *l.* *principal money* made good. *Decreed*, that so far as the bill seeks to make up the 3500 *l.* principal money as the value of the 500 *l.* *South sea* stock,

be

JACKSON v. JACKSON.

Anne Jackson, the mother of *Mary*, and her uncle, were the trustees under the marriage-settlement, and the 3500*l.* was paid into their hands. *Mary Jackson* is, by the trust, allowed to make a will during the coverture, and to dispose of this money as if she was a *feme sole*.

Mary Jackson lived but four years; before her death she made a will, and devised the 3500*l.* in trust for the benefit of her husband as to the interest thereof, during his life; and for the infant as to the principal; and if the infant dies, the whole for the husband.

Anne Jackson, the mother of *Mary*, paid the interest for the 3500*l.* for a considerable time.

Insisted by her counsel, that, as the stocks are fallen, she is only answerable as far as the value of the stock, especially as it was specifick stock, and the fortune of her daughter lay in this specifick stock, and therefore ought not to be considered as money, especially as stocks are of such a fluctuating nature, and liable to such frequent change, and that the money paid to the daughter, was only the dividends of the stock.

[514] But it appeared in the cause, that the receipts from the daughter to the mother were for interest generally, and nothing was mentioned in them of stock. The settlement too recites the daughter to be possessed of 3500*l.* principal money in her own right.

Lord Chancellor: This is a mere falling of stock without the trustees' neglect, and therefore comes under the last clause of the statute of *Geo.* 1. made for the indemnity of guardians and trustees, which provides, "That if there be a diminution of the "principal, without the default of the trustees, they shall not "be liable."

It has been said, that after the stocks fell, the trustees paid interest for 3500*l.* amounting to much more than the produce from the dividends, and therefore to a demonstration it appears to be a trust for money.

But it is well known, that during *the golden dream*, people were so infatuated as to look upon imaginary wealth as equally valuable with so much money.

It has been said, that long after the falling of the stock, the defendant *Anne Jackson* continued paying the same interest.

But still it does not answer either way, for it does not amount to the common rate of interest, and yet is more than the dividends of the fallen stock; and to compel trustees to make up a deficiency, not owing to their wilful default, is the harshest demand that can be made in a court of equity.

Notwithstanding, antecedent to the marriage, it was agreed by the defendant to take the stock at seven hundred and fifty,

be dismissed: and an account was directed of what was due for the 400*l.* South sea stock, and the 500*l.* (part of the produce of the sale of the said 100*l.* South sea stock as aforesaid) with interest at 4*l. per cent.* from *Mary*'s death. *Reg. Lib. A.* 1736. *fol.* 411. *Vide Trafford v. Boehm post.* 3 vol. 444.

and

and a transfer made accordingly; yet this court will never oblige a trustee to acquiesce under so hard and unreasonable a contract. Jackson v. Jackson.

Mary Jackson in her will recites the deed of settlement, and her power of devising.

The counsel for the plaintiff insist the devise to the husband is illegally made, and not pursuant to the power, and have endeavoured to shew, from the whole tenor of the marriage-articles, she had no power of disposing of any part of the money for the benefit of her husband, to the prejudice of the infant the plaintiff, and rely principally upon the following proviso:

"Provided nevertheless that no part of the principal money " shall be applied to the use of the said *Edward Jackson*, " without the consent of the trustees under hand and seal, to " the end that this sum may be kept intire for the advantage of " the infant."

I am of opinion that Mrs. *Mary Jackson* had no power to dispose of the principal, to the prejudice of the infant, but in one particular circumstance; therefore the disposition she has made is not pursuant to the power.

His Lordship directed, that the defendant *Anne Jackson* should account for the whole interest of the 3500*l.* stock from the death of *Mary Jackson*.

[515]

The father of the plaintiff appearing to be sufficiently competent, his Lordship would give no direction with regard to her maintenance, for he said, that whether an infant should have an allowance of maintenance during the life of the father, depends always upon the particular circumstances of the case (1).

Where a father is sufficiently competent, the court will give no direction with regard to an infant's maintenance.

(1) See *Butler* v. *Butler*, *post*. 3 vol. 60.

Vide title *Portions*, *under the Division*, *At what Time they shall be raised*, &c.

Vide title *Custom of London*.

CAP. LXIX.

Marriage.

(A) *Where it is clandestine.*

December the 10th, 1737.

Hill v. *Turner* (1).

Case 246. A Bill had been brought against an executor for an account of a testator's estate, and also prayed that there might be a guardian assigned, and maintenance for an infant; the mother was appointed guardian, and 100*l. per annum* allowed for his maintenance.

The infant being made drunk at an alehouse near the *Fleet* prison, was drawn in to marry a woman in mean circumstances and of bad character; and upon an application to this court, the wife was committed to the *Fleet*. The infant's mother, as he had no estate sufficient to maintain a wife till of age, has put him out an apprentice to a merchant in *Holland*, upon which the wife immediately instituted a suit in the ecclesiastical court, for alimony and for restitution of conjugal rights: a sentence there that the husband should cohabit, and if not, that he should pay alimony; and an order made likewise by that court, upon the guardian, to pay the sum of 10*l.* to the wife towards alimony, and afterwards a monition to the guardian to pay a further sum as an increase of alimony, and a sentence of excommunication pronounced against her for not obeying the monition, and also against the infant, the husband, for not receiving his wife.

Mary Stewart, the mother of the plaintiff, petitioned the court that a prohibition might be granted to stay the proceedings upon the decree, and excommunication against her in the spiritual court.

Lord Chancellor: I have no doubt at all as to the propriety of applying to this court, but the misfortune is, the want of a sufficient law to restrain such clandestine marriages, which [516] are not only introductive of great mischiefs, but put courts of judicature under great difficulties (2); but notwithstanding this defect in the law, it is incumbent on this court to prevent as far as they can, persons from profiting themselves by such infamous methods.

Notwithstanding the wife may have been discharged from the order of commitment, yet, till she has paid the costs of the court for the contempt, she is still under the authority and jurisdiction of this court, though she goes at large.

The sentence of the ecclesiastical court cannot be reversed in a summary way, but by appeal only to proper judges; nor can a prohibition to that court be granted upon a petition; by motion and a proper suggestion it may.

I cannot reverse the sentence which has been pronounced in the ecclesiastical court, *that* can be only done by appeal to the proper judges, for it cannot be reversed in a summary way, nor can I, upon a petition, grant a prohibition to the ecclesiastical court, for that can only be upon shewing they have no jurisdiction, which must be done by motion, and a proper suggestion: Besides, there is no colour to say the ecclesiastical court want jurisdiction,

(1) *Reg. Lib. A.* 1737. fol. 269. (2) See *Stat.* 26 *Geo.* 2. *c.* 33.

diction, for the authority they exercise in matrimonial cases is the general law of the land, and extends to persons not only of full age, but under, provided they are old enough to contract matrimony. *Hill v. Turner.*

But the question will be, Whether this is not a particular case, and so circumstanced as to give me an authority to restrain the person, without meddling with the jurisdiction of the ecclesiastical court? For an injunction, when awarded, does not deny, but admits the jurisdiction of the court of common law; and the ground upon which it issues is, that they are making use of their jurisdiction contrary to equity and conscience. The same with regard to the ecclesiastical court in case of a legacy left in trust, where the trustee is suing for payment into his own hands, the court will restrain him, out of regard to the interest of *cestui que trust*; and will do it likewise in the case of a portion devised to a daughter upon marriage, where the husband is suing for it before he has made an adequate settlement (1).

An injunction does not deny, but admits the jurisdiction of the court of common law; and the ground on which it issues is, that they are making use of their jurisdiction contrary to equity. So where a trustee is suing in the ecclesiastical court for payment of *cestuique trust's* legacy into his own hands; or in the case of a portion, where the husband is suing for it there, before a settlement made; this court will, upon the same grounds, restrain them from proceeding.

It is upon this footing I shall proceed, for if I was not to restrain the wife, all the care the court has exercised with regard to the estate and person of the infant, would be vain and useless: It has been rightly said, that this court will not only take care of the infant's maintenance and education, but that he does not marry likewise to his disparagement, and though there is no particular order to restrain, yet the marriage is a contempt of the court.

This court hath the care and ordering of infants, and tho' by act of parliament the court of wards had a particular power over them and lunaticks, yet, in every other respect, the law as to infants continued as before: and as the statute of the 12 *Car.* 2. *c.* 24. has dissolved the court of wards and liveries, *the power of this court over infants is resulted back to them again: The law of *England* is favourable to infants, no decree shall be had against them here, but what they may shew cause for, when they come of age; this court will make strangers accountable to infants, in case they take upon them to receive the profits of their estates; this court can also ascertain the *quantum* of an infant's maintenance, and to whom it shall be paid; and this is conclusive to all parties.

The power of this court over infants resulted back to them again, upon the dissolution of the court of wards and liveries, by the 12 *Car.* 2.

[*517]

The allegation of faculties is, a term in the ecclesiastical court, in regard to the ability of an infant to allow alimony, and is according to the quality of the person, and the quantity of the maintenance; it is this makes them judges of the application of the maintenance, and incroaches upon the jurisdiction of this court; and for whom have they now interposed? for the

Tho' this court cannot on petition prohibit the ecclesiastical court, yet they will restrain a person who has married a ward of this court clandestinely, from proceeding on an excommunication, either against the infant or his guardian.

(1) See *Anon*, *ante* 491.

benefit

Hill v. Turner.

benefit of a wife, who has in a scandalous manner inveigled an infant, and stolen him away from this court; but though I cannot upon a petition prohibit the ecclesiastical court, yet I will restrain the wife from proceeding either upon the excommunication pronounced against the infant, or upon the excommunication against the mother the guardian of the infant; for as there is a certain sum allotted for his maintenance, the guardian is to be considered as very little more than the hand of this court; for if the guardian applies it to other purposes, it is a misapplication, and she would be liable to the censure of the court.

Tho' a ward of the court is married with the consent of his friends, yet there must be an application *here* for an increase of maintenance.

Suppose this woman had even married the infant in a fair way, and with the consent and approbation of friends, still there ought to have been an application to *this court* for an increase of maintenance, and I have known such instances, and it is highly improper to institute a suit in the ecclesiastical court for that purpose.

His Lordship ordered, that *Mary Hill* who seduced the plaintiff the infant by ill practices to marry her, while he was under the care of this court, in contempt thereof, be restrained from proceeding in the Spiritual court against the petitioner the guardian of the infant, for payment of alimony, and that she be also restrained from proceeding there against the infant himself, for restitution of conjugal rights and alimony.

And on motion or other application to be made to the Spiritual court on the behalf of the infant, or his guardian, or either of them, to absolve them or either of them, from the sentences of excommunication awarded against them or either of them; *His Lordship* ordered, that *Mary Hill* do consent thereto in the Spiritual court, to the end that such sentence or sentences may be effectually removed out of the way.

Vide title *Conditions and Limitations, under the Division, In what Cases the Breach of a Condition will be relieved against.*

Vide title *Agreements, Articles, and Covenants.*

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C A P. LXX.

Master and Servant.

(A) *What Remedy they have against each other.*

Argles v. *Heaseman*. November 26th, 1739.

Case 247. The plaintiff's son was put apprentice to the defendant for 7 years, but quitted him on being misused, and on defendant's proceeding at law, on a bond given by the plaintiff, he brings a bill for an injunction, and for the delivery of the bond.

BY indenture of apprenticeship of the 28th of *August* 1732, the plaintiff's son put himself apprentice to the defendant a mercer for seven years, and he, in consideration of twenty pounds, covenanted to instruct the plaintiff's son in his trade, and the plaintiff agreed to pay the defendant 20*l.* more, if his son lived to the 24th of *June* 1734, and gave the defendant a bond for it (1), on such contingency. After the 24th of *June* 1734, the plaintiff's son quitted the defendant upon being misused and evil treated, in being compelled by the defendant to take care of his horses, and to do other servile offices; and upon the defendant's proceeding at law against the plaintiff upon the bond he brings a bill for an injunction, and for the delivery of the bond.

A court of equity has no jurisdiction in matters of this nature, but belongs to justices of peace, and therefore the plaintiff ordered to pay costs at law, and in this court.

Lord Chancellor: A very unnecessary suit in this court, and if I should take upon me to determine it here, it would be a vast expence to the masters and apprentices, and would be assuming a jurisdiction which does not at all belong to me, but by the statute of *Eliz.** is left intirely to justices of the peace as a matter most proper for their determination.

* 5 Eliz. c. 4. sec. 35.

Misuser of an apprentice is not a foundation for coming into equity, for if an action is brought by a master against the father of an apprentice, for a breach of covenant in quitting his service, if misuser appears, this is no breach.

The only pretence for bringing it into equity, is the *misuser*, and why cannot this be as well determined at law, for if an action is brought by a master against the father of an apprentice, for a breach of covenant in the son's quitting his service, and it should appear there has been a *misuser* of the apprentice, I should certainly direct a jury, that this is no breach, for an apprentice may leave his master upon *misuser*.

The only question is, Whether the *misuser* is a discharge of the apprentice, which is a mere matter of law, nor is there the least pretence for coming into this court.

But, *with the consent of the defendant, his Lordship* decreed, that the injunction already granted be made perpetual, and that the bond be delivered up to the plaintiff to be cancelled, and at the same time he ordered the plaintiff to pay the defendant his costs at law, on the action upon the bond, and also his costs in this court (2). [519]

(1) The bond, it seems, was given for payment of this further 20*l.* and for performance of the covenants contained in the indenture of apprenticeship. It appears from the bill and answers, that the plaintiff duly paid the further 20*l.* and the defendant brought his action upon the bond for the breach of covenant. It likewise appears, that the justices had discharged the apprentice, and had ordered one 10*l.* to be refunded. Since the coming in of the answer, it was admitted, that the defendant had repaid the said 20*l.* and that the order of sessions had been quashed by the court of *K. B.* but that another order had been made at the sessions to discharge the apprentice. *Vide Hale* v. *Webb*, 2 *Bro. Cha. Rep.* 78.

(2) *Reg. Lib. A.* 1739 fol. 179.

CAP. LXXI.

Mesne Profits.

Vide title *Occupant*.

CAP. LXXII.

Money.

February the 22th, 1738.

Case 248.

Anon'

WHERE money by an order of this court is paid into the the *Accountant Geueral's* hands, to be placed in the bank, till it can be laid out according to the directions of a decree, if you move for an application of this money, you must not only have a certificate that the money was paid into the bank, but that it is actually in the bank at the time of the motion made.

CAP. LXXIII.

Mortgage.

(A) *Of Cancelled ones.*

(B) *What will, or will not pass by it.*

(C) *Where a Person who wants to redeem, must do Equity to the Mortgagee before he will be admitted.*

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[illegible] the [illegible], 1738.

Case 249.

If a mortgage is [illegible] cancelled in the possession of mortgagee, it is as much a [illegible] as cancelling a bond.

(A) *Of Cancelled ones.*

Harrison v. *Owen*.

THIS cause went off to an issue, to try whether certain mortgages were fairly cancelled by the mortgagee, or whether they were fraudulently and by stealth carried away by the mortgagor, and the seals cut off by him.

I

Lord

Lord Chancellor said in this cause, that if a mortgagee cancels a mortgage, and it is found so in his possession, it is as much a release as cancelling a bond, but it does not convey or revest the estate in the mortgagor, for that must be done by some deed. HARRISON v. OWEN.

(B) *What will, or will not, pass by it.*

Ex parte Quincy.

August the 15th, 1750.

Vide title *Fixtures, under the Division, What shall be deemed such.*

(C) *Where a Person who wants to redeem, must do Equity to the Mortgagee before he will be admitted.*

Sir *Hugh Smithson* v. *Thompson.*

November the 9th, 1739. Case 250.

THE defendant has a prior judgment, and a mortgage likewise upon the estate of *B.* A subsequent judgment creditor, but prior in time to the mortgage, brings his bill in this court, and prays a sale of the mortgagor's estate, who is likewise willing and desirous to sell.

Where a first incumbrancer by judgment, has likewise a mortgage, though there is another judgment prior to the mortgage, yet if the mortgagee had no notice of it, the court will not direct a sale of the estate in favour of the creditor upon the second judgment, unless he will pay off principal and interest both of the first judgment and mortgage (1).

Lord Chancellor: In *Churchill* and *Grove*, 1 *Cha. Ca.* 35, 36. which has been cited by the plaintiff's counsel, the defendant's purchase was subsequent to plaintiff's security; but here the defendant is not a subsequent incumbrancer buying in a prior, but is the first of the incumbrancers who has advanced more money upon a second incumbrance. [521]

Where *the first incumbrancer*, by judgment, has likewise a mortgage upon the estate, notwithstanding there is another judgment, prior in time to the mortgage, yet if the mortgagee had no notice of such judgment, the creditor upon the second judgment shall not come into a court of equity, and pray a sale of the estate so mortgaged, without paying off the principal and interest, both of the first judgment and the mortgage; for it would be very hard, if the defendant should be in a worse condition, with a prior incumbrance in his favour, than a mortgagee without notice of a prior judgment would be in this court.

Therefore I will not decree a sale of the mortgagor's estate unless the plaintiff will submit to these terms; and if he does

(1) See the resolutions in *Brace* v. *Dutchess of Marlborough*, 2 *P. W.* 491. and *Morrett* v. *Paske*, *post.* 2 vol. 57.

not

Smithson v. Thompson. not like them, he may take his remedy at law, by extending the estate.

Vide title *Tenant by the Curtesy.*

Vide title *Heir and Ancestor.*

CAP. LXXIV.

Ne exeat Regno.

January the 12th, 1748. First Seal before Hilary Term.

Anon'.

Case 251.

A writ of *ne exeat regno* originally confined to state affairs, but now very properly used in civil cases.

UPON a motion for a *ne exeat regno*, *Lord Chancellor* said, this was originally confined to state affairs, and the intent of it was to prevent any person from going beyond sea, to transact any thing to the prejudice of the King or his government, but now it is very properly used in civil cases; but then, said *his Lordship*, to induce the court to continue it to the hearing of a cause, it is necessary for the plaintiff to shew that the debt she demands against the defendant, is certain (1).

But in this case here is nothing more than a demand of a wife against her husband, by virtue of a marriage-agreement, in which the defendant obliged himself to secure 1700 *l.* out of his estate real and personal to the wife, as a provision in case she survived him; but this is a contingency that may never happen, for the husband may survive her; and besides, if it was not so, this court would have business enough, if they inter- [522] posed wherever a marriage-settlement is suggested to be a hard bargain, and a surprize on the wife; persons should take the proper care before they marry; and therefore *his Lordship* denied the motion.

(1) So *Rico* v. *Gualtier*, *post*, 3 vol. 501. *Shearman* v. *Shearman*, 3 *Bro. Cha. Rep.* 370. See also *Anon. post.* 2 vol. 210. *Done*'s case, 1 *Cox's P. W.* 263. note 1. fifth edit.

CAP. LXXV.

Next of Kin.

Vide title *Jointenants and Tenants in Common.*

CAP. LXXVI.

Notice.

(A) *Plea of a Purchaser without Notice over-ruled.*

Kelsall v. *Bennet.*

March the 19th, 1736-7. Case 252. *A.* devises the estate in question to *B.* in tail, remainder to *C.* in fee, the bill brought by the heir of the body of *B.* for deeds and writings, and possession.

The defendant pleads he is a purchaser for a valuable consideration from *C.* and had no notice of plaintiff's title.

Where defendant claims under a conveyance, in which there is an estate tail prior to the estate under which he purchased, it is incumbent on him to see if that estate is spent, and therefore over-ruled the plea.

THE bill set forth, that *A.* made his will, in which he devised the estate in question to *B.* in tail, remainder to *C.* in fee, and is brought by the heir of the body of *B.* against the defendants, for deeds and writings, and to have possession of the estate.

The defendant pleads, that he is a purchaser for a valuable consideration from *C.* that the plaintiff's father lived in *Virginia* at the time of the purchase; that *C.* was in possession of this estate, and that he had no notice of the plaintiff's title; for that *C.* at the time of the purchase, made affidavit that *B.* was dead abroad without issue, and therefore insists he is a purchaser without notice, who may protect himself by plea.

Mr. Attorney General for the plaintiff. Both parties claim under one will, and it appears by the plea, that the defendant knew the plaintiff's father was alive, or that the plaintiff himself, if there was such a person, must of course be intitled. [523]

Besides, it is a denial only of the knowledge of the plaintiff's being *in esse*, not of his title, which they were bound to take notice of at their peril.

Lord Chancellor: If the defendant claims under a conveyance, where there was an estate tail prior to the estate, under which he purchased, it is incumbent on him to see if that

Kelsall v. Bennet. estate is spent. The question here is, therefore, Whether a purchaser can protect himself by plea, without denial of notice of the plaintiff's title. *Denial of notice* is what gives him power of protecting himself by plea.

Plea over-ruled.

Vide title *Conditions and Limitations, under the Division, Who are to take advantage of a Condition, or will be prejudiced by it.*

Vide title *Fines and Recoveries.* Willis v. Shorral.

CAP. LXXVII.

Oath.

Vide title *Evidence, Witnesses, and Proof, under the Division, Of examining Witnesses* de bene esse, *and establishing their Testimony* in perpetuam rei memoriam.

Vide title *Alien.*

CAP. LXXVIII.

[524]

Occupant.

Hilary Term, 1737.

Norton v. *Frecker*.

Case 253. A being seised of a church lease to him and his heirs during 3 lives, by settlement before marriage, limited it to the use of himself for life, and to the first and every other son in tail male; a person may take such estate so granted in fee, determinable on lives by way of remainder, as a special occupant.

RICHARD *Norton* was seised of the manor of *Kneworth* in the county of *Suffolk*, in fee simple, and of a church lease in the manor of *Alford* in *Hampshire*, and a farm called *Lanham* farm, lying in the said manor, to him and his heirs during three lives, granted by the bishop of *Winchester*.

Richard, being so seised, and having issue one son *Daniel*, intermarried with a daughter of Lord *Say* and *Seale* in 1657, and by indenture dated the first of *March* in that year, settled all

all the premisses to the use of himself for life, then as to the manor of *Ixworth* and *Lanham* farm, to the use of his first and every other son in tail male, remainder to his own right heirs: And as to the manor of *Alford*, to the use of such child or children of the said marriage, and for such estates as he should by deed or will appoint, and for want of such appointment, to the first and every other son in tail male, remainder to his own right heirs.

There were several children of this marriage, and *Richard* was the eldest, and upon his marriage with *Elizabeth Butler* an indenture was made by *Richard* the father, dated the 3d and 4th of *Oct.* 1673, which recited, that by the marriage-articles, previous to the marriage, the son had agreed to settle this estate, and thereupon *Richard* the father settled the premisses in trust for himself for life, remainder to *Richard* the son for life, and if he should die without issue male of his body, then in trust for raising portions for daughters, remainder in trust for such uses as *Richard* the younger should by his will or deed direct, and in default thereof, in trust for such uses as *Richard* the elder should appoint, and for want of such appointment, in trust for the heirs, executors and administrators of *Richard Norton* the elder; this deed was executed likewise by *Richard Norton* the son.

Some time after *Richard* the father died; in 1708, *Richard* the son likewise died without issue, and neither of them made any appointment.

Upon the death of *Richard* the son, the heir at law of *Richard* the father by the first venter, whose name was *Richard* likewise, entred into those lands.

The plaintiff was grandson of old *Richard* by his second marriage, and under the deed of 1657, had nothing further been done, would have been intitled to the premisses: In 1721 he applied to the heir at law of old *Richard*, that the [525] church lease might be renewed for the benefit of him and his son, upon his paying the fine, which was accordingly granted, and in 1722 *Richard* the heir at law delivered a deed to the plaintiff, declaring the trust of this lease to be for himself for life, remainder to the plaintiff for life, remainder to his eldest son.

In 1732 *Richard* the heir at law died, and on his death the plaintiff entred on the premisses, and now brings his bill against the administrator, with the will annexed of *Richard* the heir at law, in order to have an account of the rents and profits; the defendants by their answer insisted on the statute of limitations, but that bar being now removed by a particular act of parliament of the last session, the question upon the whole was, Whether the plaintiff was intitled to any relief?

Lord Chancellor: I am of opinion the plaintiff was, by virtue of the remainder, limited to the first and other sons in the deed of 1657, intitled to the manor of *Alford*, and *Lanham* farm, if nothing had been done subsequent to that, to bar his right.

NORTON v. FRECKER.

In the case of *Wasteneys* and *Chapple* (1) in the house of Lords in 1712, it was determined, that in respect to estates thus granted in fee determinable on lives, a person may take by way of remainder, as a special occupant, but that as such an estate tail is not within the statute *de donis*, nor barrable properly by a recovery as an estate tail, any limitations depending thereupon are intirely in the power of the first taker in tail, and may be destroyed by any conveyance, or even articles in equity, and was so determined in the case of the Duke of *Grafton* v. Lord *Euston*, in 1723, in which I was counsel myself (2).

The deed in 1673 amounted to a good disposition, by *Richard* the younger, of all the interest claimable by him, or any other in remainder after him, and clearly so with regard to *Lanham* farm, the tenant for life, and the remainder man in tail of an interest vested, having joined in the conveyance, and limited the estate to other uses. And as to the manor of *Alford*, tho' no remainder was vested in *Richard*, yet the father and son both joining, amounted to a good disposition of it, I am likewise of opinion, that the deed of 1673 would in a court of equity, operate as an execution of the power which old *Richard* had, of limiting the uses to his children by the deed of 1657, and so the uses of the deed of 1657 were destroyed that way likewise; and with regard to the transaction in 1721, there is no evidence of any concealment, or suppression of the plaintiff's title.

The rule in equity is the same as at law, as trespass will not lie for *mesne* profits till possession is recovered, so neither can a bill be brought for an account thereof till then.

The plaintiff's bill for an account of rents and profits is improper and premature, the possession never having been recovered against *Richard* the defendant's ancestor, and in this respect the proceedings in equity are the same as at law, where trespass will not lie for *mesne* profits, till the possession is re[*526]covered by ejectment: that even supposing the court should now have been of opinion that *Richard*, the heir at law of old *Richard*, had no right, and ought to be considered only as a trustee for the plaintiff; yet as he was in possession, claiming the estate as his own right, and insisting on his own title, this court cannot decree an account of rents and profits, without having any regard to the recovery of the possession (3). The bill dismissed.

N. B. *Lord Chancellor* said in this case, no executor was compellable, either in law or equity, to take advantage of the statute of limitations against a demand otherwise well founded.

(1) 1 *Bro. Par. Ca.* 457. S. C.

(2) 3 *P. W.* 266. note (E). S. C So *Forster* v. *Foster*, *post* 2 vol. 259. *Saltern* v. *Saltern*, *post*. 2 vol. 376. *Williams* v. *Jekyl*, 2 *Ves.* 681. *Blake* v. *Blake*, 3 *P. W.* 10. in note 1. *Har. Co. Litt.* 20. *a. n.* 5.

(3) See *Curtis* v. *Curtis*, 2 *Bro. Cha. Rep.* 620. *Dormer* v. *Fortescue*, *post*. 3. vol. 129, 130.

C A P. LXXIX.

Office.

Ex parte Butler and Purnell.

December the 22d, 1749.

Vide title *Bankrupt, under the Division, Rule as to the Sale of Offices under a Commission of Bankruptcy.*

C A P. LXXX.

Papist.

Smith v. *Read.*

March the 18th, 1736-7.

THE bill was brought for the rents and profits of the estate, and to discover whether *A.* under whose will the defendant claims, was a papist, at the time of a purchase made by *A.* of the estate from the plaintiff's ancestor.

Case 254.

S. C. 3 Ba. Ab. 799.
S. C. 8 Vin. Abr. 540. pl. 21.

A bill brought to discover whether *A.* under whose will the defendant claims, was a papist at the time of a purchase made by *A.* of the estate from the plaintiff's ancestor. Defendant pleads, as to the discovery, the statute of the 11th and 12th of *Will.* 3. by which, if *A.* was a papist, she was disabled to take.

Under the rule, a man is not obliged to accuse himself, is implied, that he is not to discover a disability in himself, and as *A.* would not have been obliged to discover, the defendant, who claims under the same title, is intitled to the same privileges, and takes the estate under the same circumstances. The plea allowed.

The defendant pleads a title under *A.* and as to the discovery pleads the (1) statute of the 11th and 12th of *Will.* 3. against papists, by which stat. if *A.* was a papist, she was disabled to take.

Therefore, as the defendant's counsel insisted, this bill seeks to discover what, if true, would be a forfeiture and a penalty, which no one is bound in equity to discover; and as *A.* was a purchaser, the defendant, as standing in his place, is equally so. The law obliges no man to accuse himself, and for this purpose they cited 2 *Cha. Ca.* 8. *Mollings* and *Mollings*, and the *South-sea Company* and *Dolliff*, where a disability was held equivalent to a penalty, or a forfeiture. [527]

Mr. *Attorney General* for the plaintiff said, Here the estate, if she was a papist, never was vested, or could descend; and therefore it is not to be compared to forfeitures.

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(1) See Stat. 18 Geo. 3. chap. 60.

SMITH v. READ.

The case of *Molings* and *Molings* is not a determination according to equity, for they claim under one, whom it does not appear but that they had notice could not take.

Mr. *Fazakerley* on the same side.

This prevents the estate coming to them, but does not devest it as a forfeiture, and the bill is no more than to discover a title.

The estate never moved from the grantee.

Lord Chancellor: I think the defendant is not bound to discover, for there is no rule more established in equity, than that a person shall not be obliged to discover what will subject him to a penalty, or any thing in the nature of a penalty.

Under the rule, a man is not obliged to accuse himself, is implied, that he is not to discover a disability in himself; and there is no difference between a forfeiture of a thing vested, and a disability to take, inflicted as a penalty; and the 11th and 12th of *Will.* 3. is a penal statute.

If this bill had been brought against the person himself, and there was no other penalty than this, I think he would not have been obliged to discover.

Therefore they who claim under the same title are intitled to the same privileges, and take the estate under the same circumstances.

As to its being a defective title only, it is true; but then it is a defect arising from a penalty.

The laws of bankrupts are not all penal laws, and in the cases of aliens bastards, &c. there is a difference where the disability arises from the rules of law, and where it is imposed as a penalty.

If this plea was not allowed, it would affect numberless inheritances, and protestants more than papists. And where the legislature have intended discoveries of what is penal, they have put in clauses for that purpose, as in the statute of the 12th of *Anne*, ch. 14. of the livings belonging to papists.

The plea allowed (1).

(1) See *Harrison* v. *Southcote*, next case 539.

[528] July the 31st, 1751.

Thomas Harrison, and *Elizabeth* his Wife,	—	Plaintiffs.
Edmund Southcote, and *William Moreland*, Esqrs.		Defendants.

Case 255. S.C. 2 Vez. 389.

The bill seeks a discovery of the defendant *Moreland*, whether *Southcote* was not a person professing the popish religion before he conveyed the freehold and copyhold estates to the defendant, in the bill mentioned, as a purchaser thereof.

A plea of the statute of the 11th and 12th of *Will.* 3. for preventing the growth of popery, so far as it goes to the discovery whether *Southcote* was a papist, *allowed*.

THE case the plaintiff makes by his bill is, that *Elizabeth* his wife is the only daughter of *George Stiles*, who was the younger brother of *Thomas Stiles*, late of *Watten* in *Northamptonshire*, and first cousin and heir to *Winifred Southcote* deceased,

formerly *Winifred Stiles*, the only daughter and heir of *Thomas Stiles*. HARRISON *v.* SOUTHCOTE.

That *Winifred* being seised of a freehold estate at *Watton*, of the yearly value of 130*l.* and of a copyhold estate in *Lincolnshire*, of the yearly value of 100*l.* which descended to her upon the decease of her father *Thomas Stiles*, did, in 1747, intermarry with the defendant *Southcote*.

That in the marriage settlement, dated the 28th of *January* 1747, the said estates were limited to the use of the defendant *Southcote* and his wife for life, remainder to the issue of their two bodies, remainder to the survivor in fee.

That on the 6th of *April* 1749, *Winifred* died without issue, upon whose decease *Southcote* insisted that he became seised in fee of those estates under the settlement; but the plaintiffs charge, that *Winifred* was educated in the popish religion, and so continued to her death; and that the defendant *Southcote* now does, and always hath professed the popish religion, so that by several acts of parliament made for preventing the growth of popery, and to disable papists from taking any new acquisitions, *Winifred* had not power to make such conveyance of these estates, and settle the same in such manner; nor was her husband capable to take any land or estate by purchase, but all the lands of *Winifred* descended, at her death, to her next protestant heir at law; and that the plaintiff *Elizabeth*, being the heir at law to *Winifred*, and a protestant, the real estate of *Winifred*, upon her death, descended on her; and the plaintiff *Thomas Harrison*, in right of his wife, is become intitled to the possession of the same, and ought to have been let into possession, but the defendant *Southcote*, being conscious of his own disability of taking these estates, went to the other defendant *Moreland* the next morning after his wife was buried, and told him the necessity he was under of conveying these estates before the plaintiff *Elizabeth*, as next protestant heir, could recover the same, or give notice of her claim thereto; and then desired the defendant *Moreland* to permit these estates to be conveyed in trust for him, and to prevent the plaintiff's coming at the same [529] and without any valuable consideration for such conveyance.

That such agreement being entred into by the defendants, *Southcote* did accordingly convey the freehold and copyhold estates to *Moreland*, in fee by some deed, but were never duly registred as the act of parliament requires.

That *Southcote* was in so great a hurry to convey these estates, that they were even conveyed before *Moreland* ever saw the estate, or had any estimate made of the same, and the conveyance was compleated before the plaintiffs had any account of *Winifred*'s death, and therefore they could not have made any entry upon the estates, or have given any notice of their claim.

That from the death of *Winifred* to the execution of the conveyance to *Moreland* was only nine days, during which time the defendant *Southcote* never entred upon, or was in the actual possession of these estates, or appeared amongst the tenants after the

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death of *Winifred* to the time of the sale, or ever received any money on account of the rents thereof, after her death till such sale.

That the defendant *Southcote* could not be looked on *as the reputed owner* of these estates, never having been in possession thereof; and as the same was conveyed to *Moreland*, under such circumstances, and in a fraudulent manner, and without a consideration *bonâ fide* paid; and the plaintiff being intitled as aforesaid, *they filed their bill the 28th of November* 1749, *and prayed that* Moreland *may be decreed to reconvey these estates to the plaintiffs, and that he and the defendant* Southcote *may account for the rents and profits.*

As to so much of the plaintiff's bill as seeks to compel the defendant *Moreland* to set forth, or discover whether *Winifred Southcote* did, at any time during her life, profess the popish religion; or which seeks to compel this defendant to set forth or discover, whether the other defendant *Edmund Southcote* did, at or at any time before his conveyance and surrender to this defendant, of the freehold and copyhold estates in the complainant's bill, and herein after particularly mentioned, *profess the popish religion*, or which seeks to compel this defendant to reconvey all or any part of such freehold or copyhold estates to the complainants, *or which seeks to compel this defendant to discover any of his title deeds, or writings relating to the said estates, or any part thereof.* This defendant doth plead in bar, and for plea saith, that by an act of parliament made in the 11th and 12th years of the reign of his late Majesty King *William* the Third, intitled, An act for the further preventing the growth of popery, it was enacted, "That if any person "educated in the popish religion, or professing the same, should "not, within six months after he should attain the age of 18 years, "take the oaths of allegiance and supremacy, and also sub"scribe the declaration expressed in an act of parliament made "in the 13th year of King *Charles* the Second, every such person "should, in respect of him or herself, and to or in respect of "any of his or her heirs or posterity, be disabled, and made [530] "incapable to inherit or take by descent, *devise*, or limitation "in possession, *reversion*, or remainder, any lands, tenements "or hereditaments, within the kingdom of *England*, &c. *and "that during the life of such person, or until he or she should take the "oaths, and make and repeat the said declaration, the next of his or "her kindred, which should be a protestant, should have and enjoy the "said lands,* &c. *without being accountable for the profits by him, "or her, received during such enjoyment.*"

And this defendant for further plea saith, *Edmund Southcote* being, or claiming to be seised in fee, of and in the several freehold messuages, lands, and hereditaments herein after mentioned, and to be also seised and well intitled to him and his heirs, according to the custom of the manor of *Watton* in the county of *Northampton*, in divers copyhold messuages, and also being or claiming to be possessed of, and well intitled to, several leasehold messuages for the remainder then to come and unexpired, of a term of years granted by the dean and chapter of *Peterborough*,

and

and being in actual poſſeſſion of the ſaid freehold, copyhold, and leaſehold eſtates, he did, in the month of *April* 1749, apply to this defendant, and propoſe to ſell all the ſaid freehold, copyhold, and leaſehold eſtates, and all his right, title, and intereſt therein to this defendant, for the ſum of 4500*l.* which he then declared was, in his judgment, the real value of the ſaid eſtates; but at the ſame time agreed, that if upon a further view and valuation 4500*l.* ſhould appear to exceed the real and juſt value thereof, he would return ſuch over-valuation money, or make an allowance to this defendant for the ſame; and after taking ſome ſhort time to conſider, the defendant did agree to the propoſal, and that he would, upon executing the conveyances, pay to *Southcote* 100*l.* in part, and give him a bond for the payment of 4400*l.* reſidue thereof, with intereſt, after the rate of 3*l.* 10*s.* *per cent. per ann.* and *Southcote* in two or three days afterwards, being fully ſatisfied of this defendant's ability to pay 4400*l.* did agree to accept ſuch bond, and by indentures of leaſe and releaſe, dated the 14th and 15th days of *April* 1749, and duly inrolled in the court of Common Pleas, between *Edmund Southcote* of the one part, and this defendant of the other part, in conſideration of 4500*l.* mentioned to be paid, or ſecured to be paid to him the ſaid *Edmund Southcote* by this defendant, he the ſaid *Edmund Southcote* did give, grant, bargain, ſell, releaſe, and convey unto this defendant, his heirs and aſſigns, all that capital or chief manſion-houſe with the appurtenances, ſituate, &c. at *Watton* aforeſaid, then in the tenure and occupation of the ſaid *Edmund Southcote*, and all other the lands, &c. therein mentioned, *To hold* the ſame unto and to the uſe of this defendant, his heirs and aſſigns for ever; and for the conſideration aforeſaid, he the ſaid *Edmund Southcote* did aſſign to this defendant all and ſingular the lands and tenements of him the ſaid *Edmund Southcote*, in the county of *Northampton*, by leaſe of the dean and chapter of *Peterborough*, to hold the ſame to this defendant, his executors, adminiſtrators, and aſſigns, for the remainder of a term of years, which was then to come and unexpired; and for the conſideration aforeſaid, he the ſaid *Edmund Southcote* did, by indenture of releaſe, covenant with this defendant, that he and his heirs, would, with convenient ſpeed, well and ſufficiently ſurrender all his copyhold lands to this defendant and his heirs. [531]

And this defendant for further plea ſaith, that the ſaid *Edmund Southcote* did, on or about the firſt of *May* 1749, duly ſurrender out of court into the hands of the lord of the manor of *Watton*, by the hands of the ſteward, all the copyhold eſtates; and this defendant was afterwards duly admitted tenant *to hold* the ſame, to this defendant, his heirs and aſſigns for ever.

And this defendant for farther plea ſaith, that, at or before the time of the execution of the leaſe and releaſe, he the ſaid *Edmund Southcote* delivered to this defendant the title deeds, and writings, relating to the ſaid eſtates; and this defendant at the time of the execution of the ſaid indentures, did really

and

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and actually pay and deliver to the said *Southcote*, a bank note for 100 *l.* in part of the consideration money, and this defendant at the same time entered into such bond as was before agreed upon.

And this defendant for further plea saith, that, in the beginning of the month of *May* 1749, he entered upon and took possession of all the said estates; and the said *Edmund Southcote* and the tenants attorned to this defendant, and he hath ever since been in the possession of the said estate, and intitled to receive so much of the rents and profits as became due since *Lady-day* 1749.

And the defendant afterwards took a view, and made inquiry into the value of the said estates, and upon such view and inquiry found that they had been greatly over-valued, and informed the said *Edmund Southcote* thereof, and insisted that a very considerable abatement should be made him in respect of such over-valuation out of the said 4500 *l.* and *Southcote*, being satisfied they were not worth more than 3500 *l.* did agree to abate or allow to the defendant 1000 *l.* out of the principal money secured by the said bond, and accordingly by deed poll, indorsed on the said indenture of release, dated the 25th of *November* 1749, it was declared and agreed between the said *Edmund Southcote* and this defendant, that 1000 *l.* should be abated in respect of the deficiency in value of the said estates, and that the said *Edmund Southcote* should, by an indorsement on the bond give a discharge to this defendant for 1000 *l.* part of the money thereby secured, and did agree that the said bond should remain a security for the 3400 *l.* and interest, and no more.

And this defendant, for further plea, saith, that the said 3500 *l.* paid and secured to be paid by this defendant to the said *Southcote*, for the purchase of the said several freehold, copyhold, and leasehold estates, was a full and valuable consideration for the purchase of all the said estates; all which matters and things this defendant doth plead to so much and such part of the complainant's bill as aforesaid, and demands judgment, whether he ought to be compelled to make any further or other answer.

[532] By way of answer, the defendant *Moreland* insisted, that he had not any intimacy with, or any particular friendship for, *Edmund Southcote*, before the time of making the contract, but that the purchase was fair and open, and made *bonâ fide*, and not colourable or merely to serve the designs of *Edmund Southcote*, nor did *Edmund Southcote* ever apply to him, to take or permit any conveyance whatsoever, of all or any part of the estates in trust for the said *Edmund Southcote*, or upon any trust or confidence whatsoever, without paying a full and valuable consideration for the same; nor was the conveyance made in trust for *Edmund Southcote*, or in or upon any other trust or confidence; nor was any kind of agreement at any time made or entered into, by or between this defendant and the said *Edmund Southcote*, concerning

ing the ſaid eſtates, upon any ſuch truſt or confidence, or with any kind of ſecret or fraudulent deſign whatſoever. SOUTHCOTE.

And that *Edmund Southcote*, at the time of the ſale of theſe eſtates, and for a conſiderable time before, was in the occupation of all the eſtates at *Watton* in the county of *Northampton*, and deſiring the defendant to permit him to continue in the occupation thereof as tenant to this defendant, it was thereupon agreed between the ſaid *Edmund Southcote* and this defendant that the ſaid *Edmund Southcote* ſhould hold and enjoy the ſame from *Lady-day* then laſt, for four years (it being cuſtomary there to let lands from four years to four years), at the clear yearly rent of 90 *l.* and the ſaid *Edmund Southcote* hath ever ſince been in the occupation of all the eſtate at *Watton* under the agreement, but hath not paid the yearly rent of 90 *l.* to this defendant, to whom this defendant being indebted as aforeſaid, this defendant hath not required payment thereof.

And that the reſt of the eſtates purchaſed by this defendant are freehold and lie in *Lincolnſhire*, and at the time of his purchaſe was of the yearly value of 86 *l.* 15 *s.* and is now rented at that rent. And that *Edmund Southcote* was at the time of the contract, and had from the death of *Winifred* been, the reputed owner of the ſaid eſtates, which this defendant purchaſed as aforeſaid; and that this defendant doth now, and at the time of making the purchaſe, and at all times hath profeſſed the proteſtant religion, and that he purchaſed the ſaid eſtates merely and for his own benefit.

And that the complainants had not, before the time when the defendant purchaſed the ſaid eſtates, recovered, nor hath ſince recovered the ſaid eſtate, nor had the complainants given any notice whatſoever to this defendant, before the filing of the bill, of any claim or title thereto, for or by reaſon of any kind of diſability or incapacity, or otherwiſe howſoever; neither had the complainants then, or at any time ſince, entred any claim to the ſaid eſtates in open court, at the general ſeſſions of the peace for the county, riding, or diviſion wherein any of the ſaid eſtates lie, though the complainants might have had immediate notice of the death of *Winifred Southcote*, ſhe having been long ill.

And this defendant admits he did not ſee the ſaid eſtates before his purchaſe thereof, but relied on the declaration and agreement of the other defendant.

Mr. Solicitor General for the defendant *Moreland*.* *Mr. *Murray*.

The queſtion is, Whether *Winifred* the wife was, or the defendant *Southcote* himſelf, a papiſt or perſon profeſſing the popiſh religion, and if this be a bar to the plaintiff's having a diſcovery, or the relief prayed. [533]

The bill is not brought by a proteſtant next of kin, but by the plaintiff ſimply as heir at law of *Winifred*, and thereby intitled to take the lands by deſcent, and ſtates there is a bar in his way, for in conſideration of a marriage of *Winifred* with the defendant

HARRISON v. SOUTHCOTE. defendant *Southcote*, both the freehold and copyhold lands were settled on *Southcote* for life, and the wife for life, and to the heirs of their two bodies, and to the survivor in fee; but, in order to remove this bar and to set aside the conveyance, charges at the time of the settlement she was a papist, and he also one, and is so now, and being intitled to the fee on survivorship, the settlement is void.

That *Southcote*, conscious of this, looked out for a protestant purchaser, the defendant *Moreland*, but did not give any consideration, or at least a valuable consideration, and that it was a fraudulent transaction to defeat the plaintiffs, and therefore pray a reconveyance of the freehold and copyhold lands so pretended to be sold.

The principal question is, Whether *Southcote*, selling so soon after the death of *Winifred*, can be said to be such a *visible owner* as within the meaning of the act of parliament of the 3 *Geo. cap.* 18. could convey to a protestant upon a purchase.

The defendant *Moreland* insists that *Southcote* was in possession of these estates a twelvemonth before *Winifred*'s death, and in possession also from her death till he sold.

That the plaintiffs never put in any claim at the court of sessions in the county where the lands lie, within a twelvemonth after *Winifred*'s death.

The question then is, Whether he has put in a good plea to the discovery.

The bill is brought by the plaintiff *Elizabeth* as an heir at law in general, to have a discovery of a disability or incapacity in some person under whom *Moreland* derives, on this ground only, that there is a flaw in his title, arising from this incapacity.

Whether the conveyance from *Southcote* to *Moreland* is a good conveyance, is a mere legal question.

It is clearly settled now, that no person is obliged to make a discovery, which will subject himself to a disability under these acts, as, *for instance*, would make him liable to be prosecuted as a papist.

I shall cite a case to shew the same rule will hold in favour of a purchaser under papists. *Smith* v. *Read* (1), before Lord Chancellor *Hardwicke* in 1736, (*reported in Viner and Bacon's Abridgments*). It is laid *down* there, this act must be considered as a penal law, and there is no one instance, said the court, where a person has been obliged to discover, whether he purchased under a papist.

[534] He cited also a case of *Jones* v. *Meredith* in Lord Chief Baron *Comyns's Reports*, 661.

This is a fact to be made out in evidence at law, and as the rule of law is *Nemo tenetur prodere seipsum*, so upon the equity of that rule, no person here shall be obliged to discover what will subject him to a penalty, or any thing in the nature of a penalty.

(1) *Ante* 526. S. C.

Lord

Lord Chancellor: You have not pleaded in bar to the discovery of this matter only, but to the discovery also of title deeds.

Mr. Solicitor General: The bill does not go at all upon the title deeds, for it does not charge title deeds under former settlements, where there are intails.

I am allowed to suppose every word in the plea to be true, because the plaintiffs may reply to a plea, as it is in nature of an answer and falsify; then whether it is not a good bar to discovery and relief, depends on the construction of the statute of the 3 *Geo. cap.* 18.

The end of the statute of the 11 & 12 *Will.* 3. *cap.* 4. to prevent papists having landed property, does not restrain them from selling, but invites them to change their property, and turn it into money; and, to make this act more effectual, the 3 *Geo.* enacts, "That no sale for a full and valuable consideration of any manors, *&c.* or of any interest therein by "any person being reputed owner, or in the possession or receipt of the rents or profits thereof, heretofore made, or hereafter to be made, to or for any protestant purchaser, and "merely and only for the benefit of protestants, shall be avoided "or impeached, for or by reason or upon pretence of any of "the disabilities or incapacities in the said acts incurred, or supposed to be incurred, by any of the persons making or joining "in such sale, or by any other person from or through whom "the title to such manors, *&c.* is or shall be derived, *unless*, "*before such sale, the person intitled to take advantage of such disability or incapacity, shall have recovered such manors by reason of "such disability or incapacity, and have entred such claim in open "court, at the general sessions of the peace for the county*, &c. "*wherein such manors lie or arise, and* bonâ fide *and with due "diligence pursued his remedy in a proper court of justice for the recovery thereof.*"

Averred by the plea, that the plaintiffs had not before the time when the defendant purchased the said estates recovered, nor hath since recovered the same.

Nor have they given notice of any claim before the filing of the bill.

Nor have they entered any claim at the quarter sessions.

So that the saving clause is out of the case, and must rest intirely upon *this* being or not being a trust, that is, Whether a purchase merely for the benefit of a protestant purchaser, or a trust for *Southcote*.

The legislature meant to encourage the papist to sell as fast as he could, that, before the protestant could put in his claim, he might get rid of his estate out of hand; therefore those parts of the bill, suggesting a precipitate sale, and that there was no regular survey, are immaterial. [535]

I am at liberty under this act, for argument sake, to admit *Moreland* knew him to be a papist, for it is no flaw in the title: The words of the act indeed are *for a full and valuable consideration*, but if *Moreland* should have bought for one year's purchase less than estates in the neighbourhood sell for, it would not upon

account

HARRISON v. SOUTHCOTE. account of these words make it void; in a case of *Wildgoose* v. *Moore*, before *your Lordship*, this point was settled.

The annual value is 263 *l.* as charged by the plaintiff's bill, and that the estate is part freehold, part copyhold, and part leasehold.

But it is insisted by the defendant *Moreland*, the annual value is but 176*l.* and that 3500*l.* was paid for it, and has sworn it was absolutely a purchase for his own benefit, and no trust.

I allow *Southcote* sold on purpose to prevent a protestant claim, for the act itself encourages papists to sell; but if selling a popish estate a year and a half under value, supposing it was so, was to defeat this purchase, it would be attended with this bad consequence, that it would effectually discourage protestants from purchasing.

Mr. *Hoskins* of the same side argued, that *Smith* v. *Read* was a weaker case than the present, for the defendant there was a devisee under the will of one Mrs. *Paine*, who was charged to be a papist, and therefore could not devise, and Mrs. *Read* was only a volunteer as claiming under a will.

The plea covers the title deeds in general, but it is not a plea to the discovery of conveyances to the defendant *Moreland* himself; he has sworn too, in the very words of the act, that he paid, or secured to be paid, a sum of money as for *a full and valuable consideration*, and the only reason why no sum of money hath been paid since, is the bringing of this bill.

Let a papist come to an estate by purchase, or by devise, he never could dispose of it to any other person, because he could not make a title, and therefore this act of parliament of the 3 *Geo.* *cap.* 18. came in aid of the statute of the 11 & 12 *Will.* 3. and is a very useful one for the publick, and if *Southcote* was a visible owner of the estates, then *Moreland* is clearly within the act, for he bought of a papist in such a situation as is described there; and considering the whole nature of the estate, twenty years purchase, at which rate *Moreland* paid, is a full and valuable consideration.

Lord Chancellor, before the counsel went on for the plaintiffs, asked if they could distinguish this case from *Smith* v. *Read*; for if they could not, he would not differ from himself, and said, that whether the point of collusion between the two defendants comes out to be fact or not, he ought not to compel *Moreland* to discover what would defeat his title.

The distinction between this and the case of *Smith* v. *Read*, as taken by plaintiff's counsel is, that in *that* case there was a bill barely to discover whether the devisor was a papist, and capable of devising, therefore the defendant *Read*, by discovering that [536] Mrs. *Paine* the testatrix was a papist, would have subjected herself to a forfeiture, because of a disability in the devisor; but here the defendant *Moreland* may safely discover that the vendor *Southcote* was a papist, and yet not forfeit, for the act of parliament protects him, as being a *protestant purchaser* from a papist.

Lord

Lord Chancellor said, he thought there was a distinction between the two cases, and bid the counsel for the plaintiffs go on. HARRISON v. SOUTHCOTE.

Mr. *Noel* for the plaintiffs.

The defendant *Moreland* has not paid one farthing of the purchase money, except 100 *l.* at first, *Southcote* appears to be still in possession, for it is not pretended that any rent has ever been paid to *Moreland.*

He insists that he is a purchaser under the act of parliament made in the third year of the late king.

That act was never made to protect such a purchaser, for it is impossible *Southcote* could be the reputed owner in so short a time as eight or nine days after the death of his wife, and therefore no person, who might have a claim upon this estate, could in that time give the notice required by the statute, and such a popish vendor must not only be *the visible* and reputed owner of the estate, but must also be in the actual receipt of the rents and profits of such estate.

Mr. *Clarke* of the same side.

The ground such a plea goes upon is, the defendant's subjecting himself to a penalty, and the case of *Smith* v. *Read* turned altogether upon this; the discovery here could not directly, or indirectly, subject the defendant *Moreland* to a penalty, and therefore is not within that case.

The 3 *Geo.* 1. *cap.* 18. *sect.* 4. plainly supposes the person selling to be under such an incapacity, as is within the 11 & 12 *Will.* or any other of the recited acts.

Southcote and *Moreland* lived a hundred miles distant, the one in *Kent*, the other in *Northamptonshire*; it is stated by the bill, that *Southcote* was an intire stranger to *Moreland*, and the purchaser does not pretend there was any survey before he bought, nor that he or any agent for him ever saw it.

Suppose it was *a plea of a purchase for a valuable consideration without notice*, he could not possibly protect himself under such a plea, but for money actually paid, *security to be paid* is not sufficient, and the plea would have been over-ruled; independent therefore of the vendor's being a papist, the defendant here could not support his plea, being money only *secured to be paid*; and on the circumstances of the present case, as *Moreland* has never had any possession, or ever received any rents, and as *Southcote* is still the owner, he could not, on such a plea of a purchaser without notice, to a bill brought by any person standing in the place of *Southcote*, support such a plea.

Mr. *Evans* of the same side. [537]

The fifth clause of the 3 *Geo.* 1. (which recites a part of the 11 & 12 *Will.* 3. and enacts, that the recited part of the said act

Harrison v. Southcote. act of parliament shall not be hereby altered or repealed, but the same shall be and remain in full force, as if this act had never been made) shews clearly it was not intended to give any advantages to papists, or to alter the disabling statutes, because here is an express saving to those statutes, and therefore is merely an interposition in favour of the protestant purchasers.

In the case of *Jones* v. *Meredith*, there was a plea and demurrer by a mortgagee, and both over-ruled; and for this very reason, because such a discovery could not prejudice him, the same reasoning will hold in the present case, the discovery will not subject the defendant *Moreland* to a forfeiture.

If there is a private trust for the benefit of a papist, it is clearly not within the meaning of the act of parliament, and strip this *case* of the defendant's oath, and nothing can be stronger to shew this is a trust; here is no transmutation of possession, the purchase money not to be paid till 1752, by which time they would be able to judge whether the protestant heir would put in his claim, a security only to be given for the purchase money, a security too, the interest of which is equal, as near as can be calculated, to the rents of the estate, *Moreland* put in possession, that he may set off the rents against the interest due on his bond and if such a case so circumstanced should prevail, it would greatly encourage schemes to evade this act of parliament.

Mr. Solicitor General's reply.

It is very odd to say that a volunteer from a papist should protect himself with such a plea, and yet a person under a more favourable light, a purchaser *for a valuable consideration*, shall not.

The allowing the plea does not preclude them from replying, and impeaching the truth of it, and then the court can determine, on the evidence of both sides, whether *Southcote* was a papist or not? nor does this preclude them from going into evidence at law, upon an ejectment to shew he is a papist, and suppose it should come out there he was not a papist, then why should the plaintiff compel a discovery which he may obtain at law?

This case differs from the common case of purchasers, because, the moment the estate is sold, the papist has no lien upon it *for the purchase money*, and therefore is not within the rule they compared it to, of a plea of a purchaser for *a valuable consideration*, without notice.

Penal laws are not to be construed according to rules of equity.

Lord Chancellor: The rule is, that penal laws are not to be construed according to rules of equity, and if I should allow this plea generally, it would intirely overturn the intention and effect of the act of parliament made in the 3 *Geo.* 1. for the consequence would be, a contract might be so made and con-[538]trived, that if there should be no litigation within the time, that then it should be *a trust only for the papist*; but if a controversy between the reputed owner, and protestant next of kin, then it should be deemed an *absolute purchase*.

That rule, of a man's not subjecting himself by such a discovery to a penalty, is laid down out of great tenderness, and the court will not break in upon it, unless there is a good foundation.

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There hardly can come a case before the court liable to more suspicion than the present, as to the fairness of the purchase.

Here is a person, who has no title to the inheritance of the estate till after the death of the wife, because the limitation is to the survivor and their heirs: On the 6th of *April* 1749, Mrs. *Southcote* dies; in nine days after, in which it is very difficult to acquire *a reputed ownership*, a sale is made to the defendant *Moreland*, without any knowledge of the estate in the purchaser, or previous treaty, the contract for 4500*l.* and only 100*l.* paid then, by delivering of a bank note, and a mere personal security of a bond to pay the residue in a year's time; no mortgage taken of the estate, not so much as a surety joined with *Moreland* in the bond; can any thing appear more colourable? Did any wise or prudent man ever sell his real estate for 4500*l.* and take only a bond in payment?

Afterwards a subsequent transaction passed, and the purchase money reduced from 4500*l.* to 3500*l.* which shews that the parties lumped it before; it is said this is a circumstance which gives greater credit to the purchase; I think not at all, but the true reason was, they found the consideration was greatly above the value, and concluded that might be an imputation on the fairness of the transaction, and therefore an abatement is made of 1000*l.* merely to take off the force of that objection. Another suspicious circumstance is *Moreland*'s granting a lease immediately upon his purchase of these estates to *Southcote* for the term of four years.

This is not a plea of a purchase *for a valuable consideration without notice*, and if it had, would not have done, because you must plead it was a purchase for a valuable consideration without notice, *upon money actually paid*, or else you are not hurt.

The plea here consists of two parts.

1st, A plea of the statute of 11 & 12 *Will.* 3. *cap.* 4. *sect.* 4.

2dly, Of the statute of the 3 *Geo.* 1. *cap.* 18. *sect.* 4.

It is not pretended the defendant *Moreland* is a papist himself, therefore no penalty could fall upon him on that account, but yet he insists, if he should discover the person under whom he bought was a papist, it would defeat his title.

To be sure in general, by the determination in the case of *Smith* v. *Read* (1), (which was heard the 18th of *March* 1736, and not in *Trin.* term 1737, the books which take notice of it, being mistaken as to the time), it is settled where there is a plea of a title derived voluntarily, or by a devise from a papist, and not suggested to be a colourable trust, that by reason of the penal law

A devisee from a papist by reason of the penal law which would attach upon him from the incapacity in the devisor to devise, is not compelled to discover, whether the devisor was a papist.

(1) 3 *Bac. Ab.* 799 *ante* 526.

[illegible] v. [illegible]COTE.

law which would attach upon him, from the incapacity in the devisor to devise, the defendant shall not be compelled to discover, whether the person under whom he claims is a papist.

The distinction taken by the plaintiff's counsel in the present case, and which they insist makes the difference from other cases, is, that *Moreland* has not pleaded himself a devisee, or volunteer from a papist, but a purchaser for a valuable consideration from the defendant *Southcote*, and that there are not all the averments here, which bring him within the protection of the statute of the 3 *Geo.* 1.

The rule of law is, that a man shall not be obliged to discover, what may subject him to a penalty, not what must only.

There is, no doubt, a plain distinction between the cases; but I am of opinion still he is not obliged to discover whether *Southcote* was a papist, for a purchaser is not to be hurt by any discovery, as here, for instance, where he might suffer a loss by a penal law, and though the averments of the plea are, that the plaintiff had not given notice of his claim, and observed other ceremonies required by the statute, yet it may be disproved, and come out contrary to the averments of the plea, and if it should appear in evidence, that the plaintiff has made his claim with due diligence, and as soon as he had any notice thereof; then if the defendant *Moreland* was to make a discovery, that the person under whom he purchased was a papist, he would overturn his conveyance, and though he has actually paid part of the purchase money, he never could get it back again, for the law makes such conveyance void, a papist not being capable of conveying, and the heir might recover in an ejectment.

The rule of law is, that a man shall not be obliged to discover what *may* subject him to a penalty, not what *must* only (1), and though upon the particular circumstances of the case, it might not possibly create a forfeiture, as it does not appear at present with certainty, whether such a discovery would create a forfeiture, yet eventually it may do so; and therefore with regard to so much of the plea as relies upon the statute of the 11 & 12 *Will.* 3. it ought to be allowed.

The defendant *Moreland*'s plea to the discovery of the title deeds, disallowed.

As a plea may be separated (2), I am at liberty to apply it to the different parts of the defence: The next question therefore will be as to the other part which obliges the defendant to discover his title deeds.

I am of opinion there is no ground to allow the plea here, either as to the discovery or relief.

(1) So *Honeywood* v. *Selwin*, *post*, 3 vol. 276. On this head, see *Bird* v. *Hardwicke*, 1 *Vern.* 109. *Sharp* v. *Carter*, 3 *P. W.* 375. *Anon.* 2 *Eq. Ab.* 90. pl 7. *Earl of Suffolk* v. *Green*, *ibid.* pl. 14. *ante* 450 S. C. *Duncalfe* v. *Blake*, *ante* 53. *Boteler* v. *Allington*, *post*, 3 vol. 357. *East India Company* v. *Campbell*, 1 *Vesf* 247. *Brounsword* v. *Edwards*, 2 *Vef.* 243. *Chetwynd* v. *Lindon*, *ibid.* 451. *Smith* v *Read*, 3 *Bac. Ab.* 799 *ante* 526. *Chauncey* v. *Tahourden*, *post*, 2 vol 393 *Bishop of London* v. *Fytche* 1 *Bro. Cha Rep.* 97.

(2) See *Duncalfe* v. *Blake*, *ante* 53. note.

Moreland

Moreland has not pleaded himself *a purchaser for a valuable consideration without notice*, and therefore there is no pretence for this part of the plea, especially as it goes to the discovery of that very settlement by which it is averred the heir at law is barred, and every *heir at law* has a right to inquire by what means, and under what deed he is disinherited.

> HARRISON *v.* SOUTHCOTE. Every heir at law has a right to inquire by what means, and under what deed he is disinherited.

The next consideration as to the relief, Though an heir at law is not intitled to come into this court upon an ejectment bill for possession, yet he is intitled to come here, to remove terms out of the way, which would otherwise prevent his recovering possession at law; and has also a right to another relief before he has established his title, namely, that the deeds and writings may be produced and lodged in proper hands for his inspection, and therefore the plea should not be allowed as to the relief prayed in this respect.

> An heir, before he has established his title at law, may come here to remove terms out of the way, which would prevent his recovering there, and may also come here for production and inspection of deeds and writings.

Upon the whole, I am of opinion that the plea ought to be allowed, as to the discovery sought by the bill, Whether *Winifred* or *Edmund Southcote* were not papists, or persons professing the popish religion; but as to all other parts of the plea, it must be over-ruled (1).

(1) *Reg. Lib. A.* 1750. fol. 646. But by the statute 18 *Geo.* 3. *c.* 60. *papists* (taking the oath therein prescribed) are enabled to take lands, tenements, or hereditaments by *descent*, *devise*, *limitation* or *purchase*.

C A P. LXXXI.

Paraphernalia.

Vide title *Dower and Jointure*.

C A P. LXXXII.

Parol Agreement.

Vide title *Partition*.

C A P. LXXXIII.

Parol Evidence.

Vide title *Custom of London*.

CAP. LXXXIV.

Parson.

December the 24th, 1747.

Ex parte Meymot.

Vide title *Bankrupt, under the Division, Who are liable to Bankruptcy.*

CAP. LXXXV.

Parties.

Vide title *Bill.*

CAP. LXXXVI.

Partition.

November the 29th, 1739.

Mary Ireland, sole Executrix and Residuary Legatee of *Mary Ingram*, her Aunt, — Plaintiff.

Susan Rittle and Others, — Defendants.

Case 256.

Mary and *Susan Jackson*, the daughters and co-heirs of *James Jackson*, being seised in fee of certain lands, the former married *Thomas Ingram*, and the latter *William Rittle*, and by a mutual agreement between their husbands in 1686, a partition was made of the said premisses between themselves, and the heirs of *Mary* and *Susan*.

JAMES Jackson, the plaintiff *Mary*'s grandfather, being intitled to the reversion in fee of certain copyhold lands, surrendered the same to himself for life, to his wife for life, and, after the death of the survivor, to his own right heirs; the tenant for life died soon after, and *James* the reversioner left a widow and two daughters, *Mary* and *Susan*, who, upon the death of their mother, were admitted as co-heirs of *James*, and the lord of the manor did, in consideration of 40 *l.* enfeoff and convey the same to *Mary* and *Susan Jackson*, their heirs and assigns for ever; *Mary* intermarried with *Thomas Ingram*, and *Susan*, the plaintiff's mother, with *William Rittle*, and having made no partition of the said premisses before their intermarriage, *Thomas Ingram* and *William Rittle*, the husbands of *Mary* and *Susan*, by a mutual agreement in 1686, made a partition of the said premisses between themselves and the heirs

IRELAND *v.* RITTLE.

of *Mary* and *Susan*, by which each of them agreed to take one part thereof, which they did, and entered into possession, and *Susan* now holds a share of the premisses so divided by virtue of such partition, and *Mary* enjoyed her part till her death (1), and *Mary*'s share being, at the time of the partition, somewhat larger than *Susan*'s, in consideration thereof, *Mary* paid the taxes, and the levies charged upon both.

The husbands are both dead, and the bill is brought against *Susan Rittle*, to confirm the division of the said estate.

Thomas Ingram died many years since without issue, leaving *Mary* his widow, and, in 1733, *William Rittle*, the plaintiff *Mary*'s father, died intestate, leaving the defendant *Susan Rittle* his widow and four children: the bill is brought, among other things, to confirm the division of the said estate, and that the defendant *Susan Rittle* may be restrained from proceeding at law against the plaintiff to compel a new partition thereof.

The agreement of the husbands cannot bind the inheritance of the wives.

A parol agreement for an equality of partition of a long standing, by persons who had a right to contract, and accordingly put in execution, will be established by this court.

Lord Chancellor: Where there has been a long possession under an agreement for *owelty* of partition, this court is strongly inclined to quiet the enjoyment of such estates, and I was at first of opinion to establish this agreement; but it appears now, that it was only an agreement between the two husbands, which could by no means bind the inheritance of the wives (2), for the argument of long enjoyment is of no force here, unless it had been originally the agreement of the wives, though I do admit a parol agreement of long standing, acknowledged by all the parties to have been the actual agreement, and accordingly put in execution, will be established by this court, where it appears that the persons who made such agreements had a right to contract, and I will not, at fifty-three years distance, suffer either party to controvert the equality of the partition, at the time it was made.

The next consideration is, Whether *Mary*'s share being larger than *Susan*'s at the time the partition was made, will induce the court to set it aside.

If a jointenant, upon equality of partition, thinks proper to accept of a contingent uncertain advantage, where one moiety of the land is of superior value to the other, it will not vacate the agreement.

Now supposing that the agreement was between proper parties, I do not think the objection of a contingent advantage only, to one of the parties upon the partition, is sufficient to set aside the agreement, for a jointenant upon *owelty* of partition may, if he thinks proper, accept of a contingent uncertain advantage, where one moiety of the lands is of superior value to the other, as in the present case; *Susan*, who had the less valua-

(1) *Mary* in her life-time, and after the death of her husband, *by lease and release* (as the plaintiff states by her bill) *conveyed* her part to the use of herself for life, with remainder to the plaintiff and her heirs.

(2) So *Oldham* v *Hughes*, *post.* 2 vol. 452. But this doctrine, so far as it relates to partitions (where such partitions are *equal*) is directly contrary to the text of *Littleton* (*Litt. s* 257.) and the authority of his commentator. *Co. Litt.* 171. *a.* See *Oakeley* v. *Smith*, *Amb.* 368. In the case of *May* v. *Hook* (*Har. Co. Litt.* 246. *a.* note 1.) it was held, that an agreement by an *infant* jointenant could not sever the jointenancy. So, *post.* 2 vol. 480.

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IRELAND v. RITTLE. ble moiety, by way of compensation or recompence, was to pay no taxes whatsoever; and though she may be disappointed in her expectations from this contingency, yet that will not vacate the agreement.

[543] But upon the particular circumstances of the present case, I do declare, that though the defendant *Susan Rittle* consented, in the life-time of her husband, to hold the premisses in question, according to *the partition* made between him and *Thomas Ingram*, yet that she is not bound by such agreement; but as she now submits to hold the several parts of the said premisses, as they have been already held in *severalty*, I decree that the plaintiff, and the defendant *Susan Rittle*, do respectively hold and enjoy the said several parts of the said premisses, *in severalty*, and that each of them do execute conveyances of the respective shares thereof to the other, according to their respective interests therein, and that the plaintiff do pay the taxes of the whole estate (1).

(1) *Reg. Lib. A.* 1739 *fol.* 151.

C A P. LXXXVII.

Personal Estate.

Vide title *Rents.*

Vide title *Real Estate.*

C A P. LXXXVIII.

Pin Money.

Vide title *Baron and Feme.*

CAP. LXXXIX.

Plantations.

Daniel Roberdeau, an Infant, by his next Friend, Plaintiff. *December* the 16th, 1738.

John Rous and his Wife, —— —— Defendants.

THE bill was brought for the delivery of the possession of a moiety of lands in *St. Christophers*, and likewise for an account of the rents and profits. Case 257.

The defendant demurred to the first part, for that this court has no jurisdiction over lands at *St. Christophers*, and likewise to the account prayed of rents and profits, for that the plaintiff hath not set forth a clear title to them. [544]

Lord Chancellor: As to the first part of the demurrer, I apprehend it is very right, because this court has no jurisdiction so as to put persons into possession, in a place, where they have their own methods on such occasions, to which the party may have recourse; the present bill, therefore, is carrying the jurisdiction of this court further than it ever was before. (*Vide* the case of *Angus* v. *Angus*, 1736, before the present *Lord Chancellor*.)

This court has no jurisdiction over lands at *St. Christopher's*, and a demurrer will lie to a bill brought here, for delivery of possession of lands there.

Lands in the plantations are no more under the jurisdiction of this court, than lands in *Scotland*, for it only *agit in personam*.

Lands in the plantations are no more under the jurisdiction of this court, than lands in *Scotland*.

The next question is, Whether an account of rents and profits ought to be demanded before the plaintiff has established his right at law?

No impediment is shewn to prevent the plaintiff from bringing his ejectment, for he claims a moiety as tenant in common.

As to the general equity, an infant here in *England* may bring a bill for an account of rents and profits against a person who keeps possession after the death of the infant's ancestor; and as the demurrer is only to the bill, I must take it for granted, he is resiant here in *England*.

An infant may bring a bill for an account of rents and profits, against a person who keeps possession, after the death of the infant's ancestor.

The defendant should not have demurred for want of jurisdiction, for a demurrer is always in bar, and goes to the merits of the case; and therefore it is informal and improper in that respect, for he should have pleaded to the jurisdiction.

Demurring for want of jurisdiction is informal and improper; a defendant should plead to the jurisdiction.

The delivery of possession may be inforced in person, which was the old way; but the writ of assistance to put persons in possession, as by way of injunction, is of more modern date (1).

(1) See *Stribley* v. *Hawkie*, *post*. 3 vol. 275.

Roberdeau v. Rous.

Plantations originally members of *England*, and subject to the laws thereof, unless in some customs, which they have a power of making.

Plantations were originally members of *England*, and governed by the laws of *England*; and persons went out originally subject to the laws of *England*, unless in some regulations and customs, which they have a power of making.

There have been instances of plantation estates being sold in this court, and consequently this court must have a power of inforcing a decree for a sale upon the person ordered to convey.

His Lordship mentioned the case of the widow in *Pennsylvania* and *Hamilton*, where there was an order upon *Hamilton* to deliver possession.

His Lordship held the demurrer to be insufficient, and therefore ordered the same to be over-ruled.

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C A P. XC.

Plea.

Vide title *Alien*.

Vide title *Answers, Pleas, and Demurrers*.

Vide title *Papist*.

Vide title *Purchaser without Notice*.

C A P. XCI.

Policy of Insurance.

December the 6th, 1739.

Motteux and Others *v.* the Governor and Company of *London* Assurance and others.

Case 258.
S.C. 4 Vin. 281. pl. 10.
S.C. cited 1 Vef. 317.

If a policy of insurance differs from *the label*, which is the memorandum or minutes of the agreement, *it shall be made agreeable to the label.*

THE ship *Eyles*, as appears by the bill, late in the *East-India* Company's service, was in 1732 at *Bengal*, at which time the owner employed Mr. *James Halhead* to insure this ship in the *London* insurance office for 500*l.* the adventure thereon to commence *from her arrival at Fort St. George*, and thence to continue till the said ship, with her ordnance, apparel, &c. should arrive at *London*, and that it should be lawful

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for the said ship, in the said voyage, to stay at any port or places without prejudice, and that the ship was, and should be rated at interest or no interest, without further account; in consideration whereof *Halhead* paid 15 *l.* premium, being at the rate of 3 *l. per cent.* which was the current premium then, upon the ship at and from Fort *St. George*, and a label of such agreement was, the 7th of *August* 1733, entred in a book, and subscribed by *Halhead* and two of the directors, and the policy should have been made pursuant thereto; but, upon looking into the policy, it appeared, that by a mistake the policy was made out different from the label, and instead of the ship's being insured from the time she should arrive at Fort *St. George* as it ought to have been, according to the label, the insurance is made by the policy to commence only *from the departure of the ship from Fort St. George to London*; and therefore the Company insisting, that in regard the ship was lost in the river of *Bengal*, and not in her voyage from Fort *St. George* to *London*, the plaintiffs are not intitled to recover on the policy, and for this reason the plaintiffs have brought their bill against the defendants, the Company, to be paid 500*l.* with interest, having the usual abatements in case of loss. — Motteaux *v.* the London Assurance.

The *Eyles* came to Fort *St. George* in *February* 1733, in her way to *England*; but being leaky, and in a very bad condition, upon the unanimous advice of the governor, council, commanders of ships, *&c.* she sailed for *Bengal* to be refitted, and after being sheathed, in her return upon her homeward bound voyage, she struck upon the *Engilee* sands, and was lost. Evidence was read on the part of the plaintiffs, to prove that *Bengal* was the most proper place for ships to refit, and that she went thither for that reason, and that this was a voyage of necessity, and not a trading voyage, for she took nothing on board but water, provision, and ballast. It was insisted by the plaintiff's counsel, that though the policy in that part of it which is called the risque, is beginning the adventure *from and immediately following her departure from Fort St. George*, yet that it comes within the rule in equity, that a conveyance, if different from articles, shall notwithstanding be made conformable to articles, and no instance that articles have been altered to make them similar to a subsequent conveyance; and therefore, upon this reasoning, the policy must be made agreeable to the original agreement, or minutes, called the *label*, for merchants rely so much upon the label, that the policy is rarely made out in many instances, unless in a case of loss. [546]

For the defendants, the Company, it was said,* that the *Eyles* did not go directly to *Bengal*, but to a place called *Massapatan*, which was not in the proper road, but for the benefit of the captain, who staid there six days merely for the sake of private trading; that the loss likewise was not at Fort *St. George*, or on a voyage from thence to *England*; that from Fort *St. George* to *Bengal* is a hazardous voyage; a ship might safer make the whole voyage from Fort *St. George* to *England*,

and

Merchants &c. v. the London Assurance. and therefore nothing but the strongest necessity could warrant such a voyage, and that it is impossible but there must be timber enough at Fort St. George, which is undoubtedly the largest settlement belonging to the *East-India* Company, to mend a leak, without going such a dangerous voyage merely to refit.

Lord Chancellor: This is properly a question at law, Whether it is such a loss as is within the terms of the policy.

The first consideration is, What was the real agreement?

2dly, Whether there is any breach of this agreement, by a loss within the terms of the policy?

Now the *label* is a memorandum of the agreement, in which the material parts of the policy are inserted, the master's, the ship's name, the premium, and the voyage.

In the label the words are, *at and from*; this certainly includes the continuance at Fort *St. George*, and in the first part of the policy the voyage is described in the same manner; but in the latter, according to the constant form, it points out what shall be called the risque, and the adventure there is confined to the departure only from Fort *St. George.*

[547] It has been contended on the part of the plaintiffs, that it ought to be construed equally the same, as if the words *at* and *from* were actually inserted in this part of the policy.

It is pretty difficult to reconcile the first part of the policy, and the latter; but *the label* makes it very clear, for that considers the voyage and the risque as the same, and therefore it was only the mistake of the clerk, which ought to be rectified agreeable to *the label.*

As to the second question, Whether there has been a breach, or, in other terms, a loss, this is not so properly determinable in equity.

It is not sufficient ground for coming into equity, that an insurance is in the name of a trustee, unless he refuses the *cestui que trust* his name, in an action at law.

Two reasons have been assigned by the plaintiff's counsel for coming into this court: *First,* That the insurance is in the name of a trustee: if the trustee had refused the *cestui que trust* his name in an action at law, there might have been some pretence; but upon this general ground only of a trust, I should at this rate determine all policies, without giving the company the advantage of a trial.

Secondly, That the loss is plainly and clearly according to the agreement, and if it was so, to be sure I might determine it here; but this is far from being the case.

If a ship is decayed, and goes to the nearest place, it is the same as if repaired at the place from whence the voyage was to commence, and no deviation.

The general principles laid down by the plaintiff's counsel are right, as stress of weather, and the danger of proceeding on a voyage when a ship is in a decayed condition; and in such a case, if she went to the nearest place, I should consider it equally the same as if she had been repaired at the very place from whence the voyage was to commence, according to the terms of the policy, and no deviation (1).

(1) *Guibert* v. *Readshaw*, *Park* on Insurance, 344.

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It is a very material circumstance that the governor ordered the lading to be taken out, to shew the necessity of the ship's being repaired; but there is not a syllable of proof why she might not have been equally repaired at Fort *St. George*. Motteux v. the London Assurance.

But there is one part of this case, which differs from all others whatever, and that is, as to the certain time the voyage was to commence. Now the fact is, that the ship was lost in *July* 1733, three weeks before the time of making this policy; so that clearly the ship was not at Fort *St. George* at the time the agreement was made, and therefore it is a material consideration whether this comes within the agreement.

For the plaintiffs indeed it is insisted she was at Fort *St. George* the *February* before in her voyage to *England*, and that as she went out of necessity to *Bengal* for the sake of repairing, that circumstance must be laid intirely out of the case, and the commencement of the adventure must be dated from this *February* when she came with full intention to proceed for *England*. This observation perhaps may be a very material one, but it is proper *merchants* should determine what is usual in these cases.

A question arose upon settling the issues, Whether the words in the risque, beginning the adventure from and immediately following her departure from Fort *St. George*, could not, according to the natural construction, be referred to her first arrival at Fort *St. George* in her way to *England*? [548]

Lord Chancellor: There was a case before me, upon a trial at *Guildhall*, where the owners of this very ship *Eyles* were plaintiffs, and the Royal Assurance Company defendants; and it was then debated, Whether the words *at* and *from Bengal* to *England*, meant the first arrival of the ship at *Bengal?* And it was agreed the words *first arrival* were implied, and always understood in policies; *for these reasons his Lordship directed the issues in the manner hereafter mentioned* (1).

Where there are the words *at and from* a place to *England*, *first arrival* is implied, and always understood in policies.

It was insisted by the counsel for the Company, that *Halhead*, at the time he came for the *policy*, should have compared it *with the label*, that, in case of a variation, it might have been rectified upon the spot, before he took away the policy; and therefore the difference, though a material one, must now prevail.

An agent for the owner of a ship, when he fetches the policy, not obliged to compare it with *the label*.

There is no colour for this objection, because *Halhead* was a mere agent or servant to the owner of the ship, and not at all necessary that he should be so exact as to compare *the label and policy* at the time he fetched it.

His Lordship ordered the parties to proceed to a trial at law in the court of Common Pleas in *London*, the next term, upon the following issues.

First, Whether by the label, whereon the policy was made out, it was agreed or intended, that the adventure on the ship *Eyles* should begin from and immediately on her first arrival at Fort *St. George*, in her homeward-bound voyage, or at any other, and what time?

(1) See *Chitty* v. *Selwin*, *post.* 2 vol. 359.

Secondly,

Mottraye v. the London Assurance.

Secondly, Whether the loss in *July* 1733 was a loss during the voyage, and according to the adventure which was agreed upon, or intended to be insured, by the said label or memorandum? (1)

N. B. *On a trial at* Guildhall *the jury found against the Company on both issues.*

(1) *Reg. Lib. B.* 1739. fol. 65.

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C A P. XCII.

Portions.

(A) *At what time Portions shall be raised, or Reversionary Estates or Terms sold for that Purpose.*

(B) *Rule as to the Consideration.*

(A) *At what time Portions shall be raised, or Reversionary Estates or Terms sold for that Purpose.*

Michaelmas Term, 1737.

Stanley v. *Stanley*.

Case 259.

Where there is a term for years for raising daughters' portions, payable at a certain time and a vested interest, they shall not stay till the death of father and mother; but the court will lay hold of the slightest circumstance in a settlement, that shews an intention to postpone the raising them in the life of the father and mother.

IT was in this case laid down by *Lord Chancellor*, as a general rule, that if there be a term for years, or other estate limited to trustees for raising portions for daughters, payable at a certain time, which is become a vested interest, they shall not stay till the death of the father and mother (1), unless some intention appears to postpone it; and if there does, the court will always take notice of such intention, and postpone it accordingly; and the latter cases, as *Broome* v. *Berkeley*, 2 *Wms.* 484. and others, shew, the court will lay hold of very small grounds, that speak the intent of the parties, to hinder the raising the portions in the life of the father and mother*.

* Corbet v Maidwell, 2 Vern. 640 (2).

(1) So *Gerrard* v. *Gerrard*, 2 *Vern.* 458. 1 *P. W.* 452. *Greaves* v. *Maddison*, *T. Jones*, 201. *Staniforth* v. *Staniforth*, 2 *Vern.* 460. *Saville* v. *Saville*, 1 *P. W.* 446. *Sandys* v. *Sandys*, 1 *P. W.* 707. *Hebblethwaite* v. *Cartwright*, *Ca. temp. Talb.* 31. *Hall* v. *Carter*, *post.* 2 vol. 354. *Smith* v. *Evans*, *Amb.* 633. *Lyon* v. *The Duke of Chandos*, *post.* 3 vol. 416.

(2) *Butler* v. *Duncomb*, 1 *P. W.* 448. *Pierpoint* v. Lord *Cheney*, 1 *P. W.* 458. *Reresby* v. *Newland*, 2 *P. W.* 93. *Ravenhill* v. *Dansey*, 2 *P. W.* 179. *Brome* v. *Barkley*, 2 *P. W.* 484. *Evelyn* v *Evel* 2 *P. W.* 659. *Stevens* v. *Dethick*, *post.* 3 vol. 39. *Churchman* v. *Harvey*, *Amb.* 335. *Conway* v. *Conway*, 3 *Bro. Cha. Rep.* 267.

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It was declared by his Lordship, that the three daughters, plaintiffs in the cross cause, are not intitled to have either of their portions of 8000*l.* or interest, or maintenance in respect thereof, raised out of the reversionary term of 500 years during the life of their mother (1). STANLEY *v.* STANLEY.

(1) The above noticed rule is so well established by authorities, that it seems unnecessary to state this long case from the Register's book; which however the reader will find in *Reg. Lib. B.* 1737. fol. 120.

[550] *November* the 17th, 1738.

Edmund Okeden, Esq. —— Plaintiff.

William Okeden, an Infant, and Heir Apparent of the Plaintiff, by his Guardian, and several Others. —— } Defendants.

Case 260.

Directing a gross sum to be raised does not imply that it shall be raised at once for it may be raised out of the rents and profits, and so laid up till it amounts to that sum.

WILLIAM Okeden, deceased, being seised in fee of a considerable real estate, subject to a term of 600 years, created by his marriage-settlement, and which was vested in trustees for raising 5000*l.* after his death, for his daughter *Mary*, wife of *William Glisson*, did, by his will, dated the 30th of *January*, 1717, direct, "that his debts, legacies, and funeral expences, and also the 5000*l.* should be raised and paid out of his personal estate, but if that was not sufficient, he devised to *Walter Bond*, *&c.* and their heirs, his lands in *Corfe Pool*, *Penlick*, *&c.* in trust to sell the same, or a part thereof, to pay his debts, legacies, and funeral expences, and also the 5000*l.* and such part as should not be sold, he devised to the same uses as his mansion-house, and which, by his will, together with all other his lands, he devised to the same trustees for 500 years, in trust to receive the rents, issues and profits, and to apply such part thereof as they should think fit yearly in the education, placing out, and maintenance of his two natural sons, *the plaintiff and defendant* William Okeden, *until they attained* 25 *years*, and for raising 5000*l.* the plaintiff's portion, if he should live to that age, and to apply yearly such sums as are necessary for the support of the mansion-house, *&c.* and to pay *Mary Morgan* 50*l.* a year for life; and after the expiration of the term, he devised the said premisses to the defendant the plaintiff's brother in strict settlement, remainder to the plaintiff in the same manner, remainder in fee to his own right heirs, and made the trustees executors."

The testator died in *September*, 1718, leaving *Mary Glisson* his only legitimate issue, who, with her husband, died soon after intestate; and, upon their so dying, their two daughters became intitled, as their representatives, to the said 5000*l.* and

[illegible] and interest from the testator's death, and also the reversion in fee of the real estate.

The bill charges that the plaintiff hath applied for payment of his 5000*l.* and that the defendant *Ogden*, being let into possession of the trust estate by the trustees of the 500 years term before his age of 25, had ever since applied the rents and profits thereof to his own use, and refuses to consent to a sale to satisfy the plaintiff's demand, and therefore prays that such part of the said estate may be sold as will satisfy his demand, and that the defendants, the daughters of *Mary Gl[illegible]n*, may be paid, and the estate discharged of their demands.

The principal question was, Whether upon the construction of this will the court can decree a sale of the trust estate?

Lord Chancellor. The intention of the testator is clear to me, that the sum of 5000*l.* was to be raised out of the rents and profits, and not from an absolute sale, unless from mere

[551] necessity; and what the court would do in such case, is another consideration (1).

The directing the trustees to pay yearly, money for the repairs of the mansion-house, farm-houses, plantations, *&c.* is a strong indication that the trustees should keep possession, till the defendant *William Ogden* arrived at his age of 25.

I do not think that the directing a gross sum to be raised will necessarily imply, that it shall be raised at once, and this was settled in the case of *Evelyn* v *Evelyn*, 2 *Wms.* 666. for it may be raised out of the rents and profits, and so laid up till it amounts to that sum.

The age of 25 in this will, is the time fixed for the payment, but I do not think it the time fixed for the raising, for the testator has directed, if there should be any surplus, that it should be paid to the reversioner, and the natural consequence would have been, if *William Ogden* had died before 25, that what had been received out of the rents, would have been the money of the reversioner, and must have been paid over to him.

Whether the testator computed right as to the value of this estate, is not material, for the view and intention is to be regarded only.

The consideration is, how far this court will controul the original and natural import of the testator's words, so as to decree a sale.

(1) By a liberal construction of the words *rents* and *profits*, they generally in a will include a direction to *sell* or *mortgage*, especially when in favour of debts and portions; because a devise of rents and profits will at law pass the lands. [illegible] *Lingon* v. *Foley*, 2 *Cha. Ca.* 205. [illegible]*fford* v. *Ashton*, 1 *P. W.* 418. *Mills* v. *Banks*, 3 *P. W.* 7, 8. *Green* v. *Belcher*, [illegible] 506. *Hall* v. *Carter*, *post.* 2 vol. 358. *Gibson* v. *Rogers*, *Amb* 93 *Bates* v *Dixon*, 1 *Ves.* 41 *Secus* where any subsequent words restrain the meaning of those words *to annual* profits, or to the receipt of the rents and profits, as they accrue. *Ivy* v. *Gilbert*, 2 *P. W.* 13 *Evelyn* v. *Evelyn*, 2 *P. W.* 666. *Mills* v. *Banks*, 3 *P. W.* 8. *Green* v. *Belcher*, *ante* 506. *Small* v. *Wing*, 3 *Bro. P.C* 503.

There

Okeden v. Okeden.

There have been a great many strong cases cited to this purpose, but they do not come up to the present case; the first, the case of *Brooks* v. *Banks*, the second *Ivy* v. *Gilbert* and others, *Prec. in Chan.* 583. and 2 *Wms.* 13. *Jones* v. *Warren*, before Lord Chancellor *King*, *Trafford* v. *Aston* (1), *Barry* v. *Askham*, 2 *Vern.* 20. The case of *Sheldon* v. *Dormer* (2) goes upon the point of necessity, that the annual rents and profits would not, in a vast tract of time, pay the money; besides, in that case, the very sale of the estate itself would not answer the 4000*l.* charged upon it.

Ivy v. *Gilbert* is not a case in point for the defendant the reversioner, and indeed it is impossible that these cases arising upon wills should tally in every respect, yet it certainly is a very strong case in favour of the reversioner.

This court have laid great stress upon a particular time being appointed for the payment of a portion, and have enlarged the power of trustees to raise it within the time.

It has been truly said, that this court have laid great stress upon a particular time being appointed for the payment, and have enlarged the power of trustees, in order to raise the money within the time.

Therefore here the surplus profits over and above the 50 *l.* *per annum* annuity, and the maintenance to *Edmund*, shall be applied towards the discharge of the 5000*l.* but if the surplus profits will not be sufficient to answer the purpose, then I shall be strongly inclined that the estate shall be sold to make up the deficiency.

It is absurd to suppose that the defendant *William Okeden* was intitled to be let into possession before he attained his age of 25, as both he and his brother were to have a maintenance till that age, and therefore the trustees, by letting him into possession of the rents and profits before that age, have abused their trust; for as they have managed, how was it possible that the 5000*l.* could be raised by the time the plaintiff came to the age of 25. [552]

I will not immediately decree a sale, till the trustees have accounted for the surplus rents and profits (3); for it is hard the reversioner should suffer by the sale of the estate, when it might have been quite cleared, if the trustees had faithfully executed their trust.

His Lordship ordered it should be referred to a Master, to take an account of the rents and profits of the trust estate devised to the trustees for the term of 500 years, accrued from the death of the testator *William Okeden*, until the defendant *William Okeden* attained twenty five years, that have been received by the trustees, or by the defendant *William Okeden*, and *his Lordship* declared, that the defendants the trustees are answerable for so much thereof as have been received by the defendant *William Okeden*.

(1) 1 *P. W.* 418. S C.

(2) 2 *Vern.* 310. S. C.

(3) And if what shall appear due upon the balance of the rents and profits shall not be sufficient to raise the said 5000 *l.* and interest, then his Lordship reserved the consideration, how the surplus should be raised. *Reg. Lib. B.* 1748. fol. 411.

November the 24th, 1738.

Philadelphia Boycot, Sophia Cotton, Hester Maria Cotton, and *Sidney Arabella Cotton*, the four surviving Daughters of Sir *Thomas Cotton*, Bart. deceased, and Dame *Philadelphia* his Wife, — Plaintiffs.

Sir *Robert Salisbury Cotton, Linch Salisbury Cotton, Cotton King*, and *John Crew*, — Defendants.

Case 261. Where there is a power to charge an estate with a gross sum, it implies a power to charge an estate with interest likewise (1).

BY indenture of the 27th of *July* 1687, Sir *Robert Cotton* and dame *Hester* his wife did covenant to levy a fine to trustees and their heirs of the capital messuage of *Lewenez*, and lands thereunto belonging, and of several estates in *Denbighshire* therein mentioned, to the use of Sir *Robert* and dame *Hester* for their lives, and the life of the survivor, without impeachment of waste, remainder to *Thomas Cotton* their second son, remainder to trustees to preserve contingent remainders; to the first and other sons of *Thomas*, in tail male, and after divers remainders, to the use of dame *Hester* and her heirs, with a proviso, that it should be lawful for *Thomas Cotton*, or any other tenant in tail in possession, after the death of Sir *Robert* and *Hester*, by any deed or will executed by them respectively, in the presence of three or more witnesses, to limit any part of the same lands, not exceeding 500 *l.* a year, to a wife for life for her jointure, and a power also for *Thomas Cotton*, and the other tenants in tail in possession, to charge any part of the lands, not exceeding 500 *l.* a year, for portions for his younger children, subject to a power of revocation in Sir *Robert* and dame *Hester*, and the survivor of them by deed or will.

About 1690 *Thomas Cotton*, then become the eldest son of Sir *Robert*, intermarried with *Philadelphia Linch*, and by indentures of lease and release in 1701, Sir *Robert* covenanted that *Hester* should levy a fine of the premisses therein mentioned to the use
[553] of *Thomas Cotton* (afterwards Sir *Thomas*) for life, with power to commit waste, remainder to trustees to preserve contingent remainders, remainder to *Philadelphia* for her jointure, remainder to trustees for 500 years, without impeachment of waste, remainder to Sir *Robert Cotton* in fee.

The term of 500 years was in trust, that if *Thomas* should die, leaving any daughter or daughters, or younger child or children by *Philidelphia*, living at his death, it should be lawful for the trustees, or the survivor, or the executors of the survivor, by rents and profits, or by demise, mortgage or sale of the term, or by felling timber, or by any means they should think fit, or most for the advantage of such younger children to raise such sums of money for the portions, or yearly maintenance of such children, *videlicet*, if there should be a son, and but one younger child, 3000*l.* and if two or more younger children, then 5000*l.* to be equally divided, to be paid to the daughters at 18, or marriage, which shall first happen, and to

(1) *Hall* v. *Carter, post.* 2 vol. 358.

the

the sons at 21; and, till such portions should be payable, should pay to such younger child, if but one, 60*l.* a year, and if more, 50*l.* a-piece, at *Lady-day* and *Michaelmas*, provided, if any daughter or daughters should have attained 18, or be married in the life of *Thomas Cotton*, and their portions unpaid, or if any son should attain 21, in *Thomas Cotton*'s life-time, and their portions unpaid, then the portion of such child or children should be paid to them in twelve months after the death of *Thomas Cotton*, or as soon afterwards as might be, and in the mean time, the said 60*l.* and 50*l.* yearly, or the interest of their portions for a maintenance.

Boycot v. Cotton.

Dame *Hester* died in 1709, and Sir *Robert Cotton* in *December* 1712, without revoking or altering the uses of the deed of the 27th of *July* 1687, leaving several children, particularly *Thomas Cotton*, his then eldest son, who entered upon the estates limited in use to him by the deed of *July*, 1687, and had 12 children by *Philadelphia*, and, being minded to increase her jointure, executed a deed-poll, dated the 31st of *July* 1714, whereby he did limit the capital messuage, with the lands and appurtenances in *Lewenez*, and several other lands in *Denbighshire*, whereunto the power did extend, and which were then under the yearly value of 500*l.* to the use of *Philadelphia* and her assigns, after his decease, for life, as a further increase of her jointure; and as a further provision for his younger children, did execute another deed poll, dated the 1st of *August* 1714, reciting the deed of the 27th of *July* 1687, and that of the 31st of *July* 1714, and that he, in pursuance of the power given him for raising portions for younger children, did charge the residue of the messuages, lands and premisses comprized in the indenture of the 27th of *July* 1687, and *not limited by the said deed poll to his wife*; *and after her decease* did charge the several premisses and appurtenants therein mentioned, with the sum of 675*l.* for the portion of his son *Stephen*; 675*l.* for *John Salisbury Cotton*; 675*l.* for *Lynch*; 675*l.* for the plaintiff *Philadelphia Boycot*; 675*l.* for the plaintiff *Sophia*; 675*l.* for the plaintiff *Hester Maria*; 675*l.* for *Sidney Arabella*; and 675*l.* for *Vere*; such portions to be paid to such children as should have attained 21 before his death, within one year after his death, and to such child as should be under 21 at his death, *to be paid to his sons at* 21, and to his daughters at 21, or marriage, which should first happen, the respective portions *to be paid with interest at five* per cent. per ann. *from his death, to the payment thereof.*

The principal of a portion to be paid to sons at 21, to daughters at 21 or marriage, with interest at 5 per cent. per ann. from the death of the father, to the payment thereof.

The interest ought not to accumulate till the portions are payable, but to be paid annually, for it is given as a recompence in the mean time, till the principal becomes due.

[554]

Sir *Thomas Cotton* died the 12th of *June* 1715, and appointed dame *Philadelphia* sole executrix of his will, and left nine children, *Robert*, then Sir *Robert*, *Stephen*, [illegible]*h*, *Linch*, the plaintiffs, and also *Vere*.

In 1716, dame *Philadelphia* intermarried with *Thomas King*, Esq; since deceased, and by the death of Sir *Thomas Cotton*, the plaintiffs, and also *John Salisbury Cotton*, became intitled to their shares of the 5000*l.* with interest from 18, and to the sum of 675*l.* a-piece, limited to them by the deed of the 1st of *August* 1714, with interest from the death of Sir *Thomas*.

Bovey v. Cotton.

Philadelphia had two children by Mr. *King*, *Thomas* and *Cotton King*.

In 1727, *Stephen Cotton* died, having made his will, and appointed Sir *Robert Salisbury Cotton*, his brother, sole executor and residuary legatee.

On the 21st of *March* 1728, *John Salisbury Cotton being above* 26, *died intestate and unmarried*, having received very little, if any, of the said sums, and administration was granted to dame *Philadelphia* his mother.

About *September* 1730, *Vere Cotton* died intestate and unmarried at the age of 16, having received very little, if any, of the shares due to her of the said several sums, and administration was granted to *Philadelphia* her mother.

Dame *Philadelphia*, *Thomas King* the elder, *Lynch Cotton*, and the plaintiffs came to an agreement, dated the 2d of *October* 1734, whereby *Thomas King* and dame *Philadelphia*, in consideration that the plaintiffs had agreed to release all their claim on account of the personal estate of Sir *Thomas Cotton*, and the rents of the *Denbighshire* estate, received by dame *Philadelphia* after her marriage, did agree to convey to the plaintiffs all their right and interest in the personal estate of *John Salisbury Cotton* and *Vere Cotton*.

Thomas King, the elder, died about *January* 1734-5, having bequeathed his personal estate to dame *Philadelphia*, and appointed her sole executrix.

In pursuance of the agreement abovementioned, by a deed, dated the 28th of *March* 1735, *Philadelphia* assigned to the plaintiffs all her parts and proportions of the personal estates of *John Salisbury Cotton* and *Vere Cotton*, which were vested in her, To hold to the plaintiffs, as their estates in equal shares, and appointed them her attornies to receive the same.

The plaintiffs having attained the age of 18, have brought their bill against Sir *Robert Salisbury Cotton* and the trustees, praying that their portions may be raised and paid in pursuance
[555] of the deed in 1701, and also the 675 *l.* a-piece, charged on the estate in *Denbighshire*, with interest from the death of Sir *Thomas Cotton*, and also for the plaintiffs' shares of the estate of *John Salisbury Cotton*, with interest from his age of 21, and also for their shares of the estate of *Vere Cotton*.

Lord Chancellor. It is admitted in the cause, that the whole of the lands charged did not amount to above 500*l.* *per ann.* that *Vere Cotton*, one of the daughters of Sir *Thomas Cotton*, died at the age of 16, and that *John Salisbury Cotton*, one of the sons, died at or about the age of 27.

The first question is, Whether Sir *Thomas Cotton* could charge interest?

The second question, Whether he has so charged it, that it may be annually received, or whether it must be accumulated and paid by way of principal sum at the age of 21?

The third question, Whether the sum of 675*l.* was transmissible at the death of Mrs. *Vere Cotton* at 16, or sinks into the real estate for the benefit of the reversioner?

As

As to the first question, I am of opinion, that Sir *Thomas Cotton* could charge the estate with interest, for where there is a power to charge an estate with a gross sum, it likewise implies a power to charge it with interest, because it may be necessary that interest should be given by way of maintenance, for there may be no other.

BOTHOT v. COTTON.

This court has been so liberal in their construction, that they have charged land with interest, even before the portion has vested.

It was objected by the counsel for the defendant Sir *Robert Salisbury Cotton*, that this is a power to charge an estate in reversion only, and it has been truly said, that this court has been very careful, that real estate in the hands of the heir shall not be overburthened.

But the rule does not prevail in the present case, because it appears by the settlement in 1687, that regard was paid to the preservation of the estate for the reversioner, the intention being chiefly to make a large provision for younger children, and Sir *Thomas Cotton* has subsequently charged the whole value of the estate for portions.

If Sir *Thomas* could therefore exhaust the whole estate, by charging of principal sums, then where is the difference, if he exhausts it by charging partly interest, and partly principal, or by principal only.

As to the second question, I am of opinion that the interest ought not to accumulate, but to be paid annually, for when it is given at the rate of 5 *per cent.* the natural construction is, that it should be paid annually, and becomes due every day, for it is given as a recompence in the mean time, till the principal is due.

As to the third question, I am of opinion that Mrs. *Vere Cotton*'s share of 675 *l.* ought not to be raised, but ought to sink for the benefit of the heir.

It is settled now, whether the portion charged upon land be given with or without interest, by deed or by will, if the person dies before the age at which it becomes payable, it shall sink into the estate.

Whether a portion charged on *land*, be given with or without interest, by deed, or by will, if the person dies before it becomes payable, it shall sink in the estate (1).

The case of *Cave* v. *Cave*, 2 *Vern.* 508. has been much relied on by the counsel for the plaintiffs, in support of their opinion, that the principal ought to be raised, notwithstanding the death of Mrs. *Vere Cotton* at her age of 16; in that case Mr. *Vernon* states it, " that *A.* devised 4000 *l.* to his son to be paid at his age " of 25, and interest in the mean time, and he to have a

The case of *Cave* v. *Cave*, 2 Vern. 508. is intirely mistaken by the reporter, for as it is stated in the Register, which was searched by *Lord Chancellor*'s order, it is impossible there could be that question in the cause, which the book states.

(1) See *Prowse* v. *Abingdon*, *ante* 482. *ante* 512. *Fonnereau* v. *Fonnereau*, *post*, *Hubert* v. *Parsons*, 2 *Ves.* 262. *Secus* as to *personal* property, See *Van* v. *Clarke*, 3 vol. 645.

 " main-

Boycot v. Cotton.

" maintenance, and directs the 4000 *l.* to be raised out of a " trust estate: the son dies under 25, held by Lord Keeper " *Wright* to be a vested legacy, and that it went to his ex- " ecutors."

This case, as it is reported in the books, is an authority in point, but I have ordered the Register to be searched, and, as it is there stated, it is impossible it could be made a question in the cause: I am very sorry to find that the reports of so able a man should be so imperfect, and come out in this manner.

A portion given to one, payable at a certain age, and if he dies, to another, without mentioning any age, if the first dies before the time of payment it vests in the second immediately.

Where a portion is given, payable at a certain age, to one person, and if that person dies, limited over to another, without mentioning any age, when it should be paid, if the first dies before the time of payment, it vests in the second immediately, for it is as to him a new legacy (1).

The case of *Bruen* v. *Bruen*, in 2 *Vern.* 439. goes a great way to overturn his own authority of *Cave* v. *Cave*, and as it is reported in *Prec. in Chanc.* 195. is exactly right. "The case was, a " term created by a marriage-settlement to raise 3000*l.* for " daughters' portions, within two months after the death of the " survivor of husband and wife: the daughter of the marriage " dying at the age of five years, and the portion being *to be raised* " *out of land*, it shall not be *raised* for her administrator, but " the interest or maintenance the child was intitled to, shall be " raised."

Jackson v. *Farrand*, 2 Vern. 424. is an anomalous case, and Lord *Hardwicke* declared he should lay no stress upon it.

This comes extremely near the present case: there is an authority too in Lord *Cowper* exactly in point: The case of *Tourney* v. *Tourney*, *Prec. in Chan.* 290. "There, by mar- " riage-settlement, a term is created for raising 400*l.* a-piece " for younger children, to be paid them within a year after " the father's death, and with interest from his death; one of " the children dies after the father, *but within a year after his* " *death*, the portion not being raised; held by Lord *Cowper*, " that it should sink in the inheritance, and not be raised for " the benefit of its representative." *Jackson* v. *Farrand*, 2 *Vern.* 424. is quite an anomalous case, and I lay no sort of stress upon it.

There will still a question remain as to the interest of Mrs. *Vere Cotton*.

Where there is a power of [illegible] interest shall be considered as maintenance.

I am of opinion, as there was a power of charging interest, that it should be considered as maintenance, for giving of interest is the same thing as giving an express maintenance, and whoever has maintained the daughter, will be intitled.

If a younger brother has a provision under a settlement, and lives with the elder, whose estate is charged with the portion, he shall have an allowance for this maintenance out of the interest due.

As to the six years Mr. *John Salisbury Cotton* lived with his brother, if Sir *Robert Cotton* insists upon it, I cannot help allow-

(1) See *Lowndes* v. *Williams*, 2 *Cox's P. W.* 480, and the cases there cited.

ing

ing him something for maintaining him so long, for if a younger brother has a provision under a settlement, and lives with the elder, who is intitled to the estate so charged, *he* shall have an allowance for his maintenance. In this case *his Lordship* directed Sir *Robert*'s allowance for the maintenance to be paid out of the interest due to Mr. *John Salisbury Cotton*, upon his share of 675 *l.*

His Lordship declared, that Mrs. *Vere Cotton* dying before such time as her portion becomes payable, the principal sum of 675 *l.* ought not now to be raised, but must sink into the estate charged therewith, for the benefit of the defendant Sir *Robert Salisbury Cotton* the heir at law, and did therefore order the plaintiff's bill, as far it seeks to have the 675 *l.* raised for the portion of Mrs. *Vere Cotton*, to be dismissed.

And as to the rest of the cause, decreed that it be referred to the Master to take an account of what is due to the plaintiffs for their original portions of 675 *l.* a-piece under the deed of the 27th of *July* 1687, with interest for the same at 5 *l.* *per cent.* from the death of Sir *Thomas Cotton* (1).

An account was directed to be taken likewise of what is due for the share of Mr. *John Salisbury Cotton*, of the sum of 5000 *l.* provided for the portions of the younger children, under the marriage settlement of 1701, with interest to be computed after the rate of 4 *per cent.* from the time of *John Salisbury Cotton*'s attaining the age of twenty-one, except when he was maintained by his brother, and then the maintenance to be set against the interest.

And it appearing there was no maintenance for Mrs. *Vere Cotton* during her life, except the interest directed by the deed of 1687; *his Lordship* declared, that a reasonable allowance should be made for her maintenance during her life, equal to the interest of her portion of 675 *l.* at 5 *per cent.* from the death of Sir *Thomas* her father, and did therefore decree the several sums before mentioned (the sum of 675 *l.* appointed to Mrs. *Vere Cotton* excepted) to be raised by sale of the lands and premisses, comprized in the deed of the 1st of *August* 1714, subject to the jointure of Lady *Philadelphia*; and out of the money arising by the sale, he decreed that the plaintiffs should be paid their original portions of 675 *l.* together with interest for the same as aforesaid, and as to the portion of 675 *l.* given to *John Salisbury Cotton*, he ordered that the same be divided into ten equal parts.

And as to what shall be found due for the share of *John Salisbury Cotton* in the 5000 *l.* provided by the settlement of the 17th of *July* 1701; it is decreed that the same be raised by mortgage, or sale of part of the estate charged with these portions, subject to Lady *Philadelphia*'s jointure (2).

(1) The like direction with respect to the 675 *l.* of *John Salisbury Cotton*; and the maintenance which he received from his brother to be set against the interest.

(2) *Reg. Lib. A.* 1738. fol. 306.

(C) *Rule as to the Consideration.*

August the 1st, 1744.

Ex parte Marsh.

Vide title *Bankrupt, under the Division, The Construction of the Statute of* 21 Jac. 1. cap. 19. *with respect to Bankrupt's Possession of Goods after Assignment.*

Vide title *Conditions and Limitations.*

CAP. XCIII.

Power.

(A) *Whether well executed or not.*

(B) *Of the right Execution of a Power, and where the Defect of it will be supplied.*

(A) *Whether well executed, or not.*

At the Rolls, 1739.

Molton v. *Hutchinson.*

Case 262.

S. C. 2 Eq. Ca. Ab. 659. n. *J. C.* by will devises the produce of 1000*l.* *S. S.* stock to *F. C.* for life, and gave him a power to dispose of 400*l.* thereof, by any writing signed in the presence of three witnesses, and if *F. C.* made no appointment, the 400*l* was devised over to a charity.

F. C. made his will, gave several legacies, and then devises the residue of his personal estate amongst his nearest relations; held to be no execution of the power, and that the 400*l.* did not pass by the devise of the residue.

Parol evidence not allowed to prove *F. C.*'s intent to dispose of the 400*l.*

JOHN Cutler, by his will devised the income and produce of 1000*l.* *South-sea* stock to *Freeman Cutler* for life, and gave him a power to dispose of 400*l.* thereof, by any writing signed in the presence of three credible witnesses, and in case *Freeman Cutler* made no such appointment, he devised the 400*l.* over to a charity: *Freeman Cutler* made his will, and thereby gave several legacies, and then devises *the rest and residue* of his personal estate among his nearest relations: *The question was, Whether this 400l. passed by that devise of the residue, and was a good execution of the power.*

Parol

Parol evidence was offered to prove it was the intent of *Freeman Cutler*, that the 400*l.* should be disposed of by his will, but was not allowed. MOLTON *v.* HUTCHINSON.

The Master of the Rolls, though he acknowledged a man might execute a power or appointment, without particularly reciting it, yet here he held this was not an execution of the power, but the 400 *l.* must go over according to the will of the first testator (1).

(1) *Andrews* v. *Emmot*, 2 *Bro. Cha. Rep.* 297. See also *Probert* v. *Clifford*, *ante* 441.

Ex parte George Caswall; In the matter of *John Caswall*, a Bankrupt. *August* the 1st, 1744.

Case 263.

A person may execute a power without reciting it, but necessary he should mention the estate which he disposes of (1).

SIR *George Caswall*, the father of the petitioner, and the bankrupt, surrendred a copyhold estate, lying at *Woodford* in *Essex*, to *William Billers*, and another person, to the use of the wife of Sir *George Caswall* for life, and after his death, to pay the rents and profits to all his children equally, and then in trust to such use or uses as Sir *George* shall by deed or will appoint, and for want of such appointment, then to his son *John Caswall* and his heirs.

Lady *Caswall* is dead, and Sir *George*, upon the 26th of *Aug.* 1742, makes his will in the presence of three witnesses, in which there is the following clause, "As to all the rest, residue, and remainder of my effects, real and personal, of what nature, kind, or quality soever, I give to my son *George Caswall*, in full bar and satisfaction of what he may claim by virtue of the custom of *London* or otherwise."

The testator died soon after, and *John Caswall* at the time of making the will was dead.

George Caswall by his petition prays, that *Thomas Clifford* the assignee of the estate and effects of *John Caswall*, under the separate commission of bankruptcy issued against him, may take a proper conveyance of the copyhold lands at *Woodford*, in the petition mentioned from the commissioners, and that he might thereupon duly surrender and pass the same to the petitioner and his heirs, or as the petitioner should direct and appoint.

Mr. *Brown*, who was counsel for the petitioner, insisted, that Sir *George Caswall* had by will made a proper appointment to the petitioner, and that the assignees under the commission against *John Caswall* the eldest brother of the petitioner, ought to deliver the possession accordingly: he cited Lord *Ferrer's* case, and *Bainton* v. *Ward*, *April*, the 24th, 1741 (2), to shew the present is like those cases, because Sir *George* had a power to dispose of it absolutely. That it ought to be considered as an interest or estate in Sir *George Caswall*, and not as any

(1) See *Probert* v. *Morgan*, *ante* 441. (2) S. C. *post.* 2 vol. 172.

Ex parte CASWALL.

part of the eſtate of *John Caſwall*, and compared it to the caſe of *Carr* v. *Elliſon*, *April* the 6th, 1744, where Mr. *Carr* by his will deviſed his eſtate in general words, without particularizing the copyhold, and yet held by *Lord Chancellor* that it paſſed (1).

[560] Mr. *Attorney General* for the creditors of *John Caſwall*, who became a bankrupt in 1741,* ſaid, the caſes cited by Mr. *Brown* were not applicable, becauſe there the power was actually executed.

Lord Chancellor: The caſe of Lord *Ferrers* is a very extraordinary determination, becauſe the known rule of law is, that if a power is executed, the perſons take by virtue of that power only, and not under the appointer, for when he has once appointed, he has nothing more to do with the eſtate, and therefore they need not derive through him (2).

The inference from the circumſtance of the ſon's being a bankrupt is not to be regarded, for I muſt make ſuch conſtruction as if *John Caſwall* was living, and no bankrupt.

The queſtion is, Whether this be a good execution of the power? What a court in a judicial way may do, is another matter; but in this ſummary way, as I am at preſent adviſed, I am of opinion it is not a good execution of the power.

The material thing is the limitation over of the copyhold in the ſurrender; what is the effect of that? Why, there is an eſtate actually veſted in *John Caſwall*, and nothing but an appointment executed could deveſt it out of him; and this would have been the conſtruction if it had been a legal eſtate, and though it is a truſt eſtate, yet in this court ought to be conſidered and conſtrued in the ſame manner, and therefore is no more than an eſtate for life to Sir *George Caſwall*, remainder in fee to *John Caſwall*, ſubject to be defeated and opened, on a proper appointment, by Sir *George Caſwall*.

Though a man may execute a power without reciting, or taking the leaſt notice of the power, yet it is neceſſary he ſhould mention the eſtate which he diſpoſes of, and muſt do ſuch an act as ſhews he takes notice of the thing which he had a power to diſpoſe of.

Sir *George Caſwall* had other lands on which the deviſe to *George Caſwall* might be ſatisfied.

Freehold lands only will paſs by a deviſe of all his lands, and not copyhold, unleſs a teſtator has nothing but copyhold.

Leaſehold, if there are no other, will paſs by the words *lands and tenements*.

If a man deviſes all his lands and tenements, only freehold land will paſs, and not copyhold; yet if he has nothing but copyhold lands, they ſhall paſs (3). So where freehold lands and leaſehold lands are deviſed, if there are no other than leaſehold lands, they ſhall paſs by the words *lands and tenements* (4).

(1) S. C. *poſt.* 3 vol. 73.

(2) *Cook* v. *Duckenfield*, *poſt.* 2 vol. 562, 568. *Hall* v. *Carter*, *ibid.* 356. *Southby* v. *Stonehouſe*, 2 *Veſ.* 612. See *Hare* v. *Fletcher*, *Doug.* 43.

(3) See *Smith* v. *Baker*, *ante*, 386.

(4) So *Day* v. *Trig*, 1 *P. W.* 286. *Knotsford* v. *Gardiner*, *poſt.* 2 vol. 451. and references.

But

But here is nothing that is at all descriptive of the thing which Sir *George Caswall* had a power to dispose of, but what is applicable to other estates of which Sir *George* was seised and of which he could equally dispose.

Ex parte, CASWALL.

I do therefore order the petition to be dismissed.

(B) *Of the right Execution of a Power, and were the Defect of it will be supplied.* [561]

Hervey v. *Hervey*.

November the 12th, 1739.
Case 264.
S. C. Barn. C. B. 103.
S. C. 2 Eq. Cas. Abr. 669. pl. 20, 21, 22.

EDWARD *Hervey* the father, by settlement made on his own marriage with his first wife, the mother of the defendant *Michael Hervey* the son, was tenant for life of the family estate which was very large, with a power to make a jointure on a second wife of 600 *l.* *per ann.* remainder in tail to his first and other sons.

It was agreed in consideration of 5000 *l.* of the portion paid to the father of the defendant, on his marriage, that he should be put into immediate possession of part of the estate; and as to the remainder, it was to be settled on the father for life, with a power for him to make a jointure of such of the lands as he thought proper, not exceeding 600 *l.* *per ann.* remainder to the son in tail, remainder over, and settlement was made accordingly.

On the marriage of the defendant the son, it was agreed that a recovery should be suffered to bar the uses of the former settlement; that in consideration of 3000 *l.* part of the portion paid to the father, the defendant should be put into immediate possession of part of the estate, and as to the rest it was to be settled on the father for life, with power for him to make a jointure, of such of the lands as he thought proper, not exceeding 600 *l.* *per ann.* remainder to the son in tail, remainder over, and the settlement was made accordingly (1).

Hervey the father, before his marriage with the plaintiff his second wife, whose maiden name was *Mary Carteret*, by his deed, dated the 5th of *May* 1725, conveyed all the premisses in the settlement contained, limited to him for life, of the yearly value of 900 *l.* to trustees † *in trust*, in the first place, to pay 100 *l.* clear, as pin-money, to the intended wife during the coverture; and upon this further trust, if she survive her husband, to pay the plaintiff 300 *l.* *per ann.* rent-charge to his wife for her jointure, and to permit the defendant to take the profits of the estate, provided he did not interrupt her in the receipt of the 300 *l.* *per ann.* which was declared to be in bar of dower of the wife, or of any jointure on any other land.

By a deed of the 5th of *May* 1725, *Hervey* the father, before his marriage with the plaintiff his second wife, conveys an estate of 900 *l.* *per ann.* to trustees in trust to pay 100 *l.* clear as pin-money to the intended wife; if she survive him, to pay her 300 *l.* *per annum* rent-charge for her jointure.

(1) This settlement was made accordingly by indentures bearing date the 22 *and* 23 *days of July* 1715 and in the release there was the usual covenant from *Edward* and *Michael* to *make further assurances*.

† And their heirs during the lives of the said *Edward* and his intended wife.

The

Hervey v. Hervey.
After marriage, he by a second deed, gives her another 300*l.* *per ann.* clear.

The marriage took effect.

By a second deed *Hervey* the father gives his wife another 300 *l.* *per ann.* clear, as a further provision by way of jointure.

By a deed of the 15th of *Jan.* 1731, as a further provision for the wife, and in execution of the power, he conveys all the said premisses to the same trustees to raise the further sum of 100 *l.* for pin-money, and the net sum of 600 *l.* *per ann.* as a provision for her in case she survive her husband, in bar of all other provisions before made; and in the settlement is the following declaratory clause: "It his hereby declar-"ed and agreed, by and between, &c. that it is the intention of this deed, and of the preceding ones, "to secure a jointure to his then wife, not exceeding 600 *l.* *per ann.*"

The plaintiff having survived her husband, brings her bill against his son, and the trustees under the several deeds, to have the benefit of these provisions, all or some of them.

The defendant and the trustees decreed to convey to the plaintiff a jointure, not exceeding 600 *l.* *per ann.* but to be made liable to taxes, repairs, &c. and to hold and enjoy the same against the defendant, &c. during her life.

*And by a deed of the 15th of *January* 1731 (1), as a further provision for the wife, and in execution of the power, *Hervey* the father conveyed all the said premisses to the same trustees in the former deed, to raise, during the joint lives of the husband and wife, the said sum of 100 *l.* *per ann.* for pin-money, and the net sum of 600 *l.* *per ann.* as a provision for her in case she survive her husband, in bar of all other provisions before made; and in this settlement is the following declaratory clause.

[*562] "It is hereby declared and agreed, by and between all the "parties to these presents, that it is the intention of this deed, "and of the preceding ones, to secure a jointure to his then "wife, not exceeding 600 *l.* *per ann.*"

No recovery was ever suffered in pursuance of the agreement made on the son's marriage.

Mrs. *Mary Carteret*, now *Hervey*, survived her husband, and has brought her bill against his son *Michael Hervey*, and the trustees under the several deeds, to have the benefit of those provisions, all or some of them.

Lord Chancellor: The first thing to be considered is the construction of the power under the deed, between *Edward* and *Michael Hervey*.

It is very plain that this was a power in *Edward Hervey* to settle a jointure upon any after-wife, and so *toties quoties* upon any subsequent marriage; it is a power likewise to settle and assure, that is, to convey a legal estate; but then it is limited in point of value, for he could not settle all the manor, but only so much as would amount to 600 *l.* a year, and that only during the natural life of such wife.

It is very certain, nor is it denied by the plaintiff's counsel, that Mr. *Edward Hervey*, in point of law, could not, by virtue of this power, settle an annuity clear of taxes upon any after-marriage, by way of provision for the wife (2).

(1) This deed recites the two former executions of the power and for the more effectual securing the payment of the said sums of 100*l.* 300*l.* and 300*l.* at the times therein mentioned &c.

(2) See *Tyrconnel* v. *Ancaster*, 2 *Ves.* 500. *Blandford* v. *Marlborough*, *post.* 2 vol. 542.

HERVEY v. HERVEY.

Let us then consider in what manner Mr. *Edward Hervey* has executed this power.

In the first place, he conveys all the lands which were subject to the power to trustees, not to the intended wife, for raising a clear 300 *l. per ann.*

By the second deed, to raise 300 *l.* more, clear of taxes *&c.*

And by the third deed, he recites that he intended only to secure to her 600 *l. per ann.* and no more, by all those deeds.

Now upon this state it appears to me, that the execution of the power is absolutely void in law and equity.

[563]

For the power is to settle lands for a jointure, or provision, not exceeding 600 *l. per ann.* and he has settled 900 *l. per ann.* (1).

A conveyance to make a jointure ought to be to the wife herself, and not to trustees.

The words *jointure*, or *provision*, are synonymous terms; but this is a conveyance to trustees, which is in point of law no jointure; for, to make it so, the conveyance ought to be *to the wife* herself (2).

Mr. *Edward Hervey* too has conveyed a clear estate of 600 *l. per ann.* which is likewise contrary to the power.

As this is undeniably void in law, consider how it will stand in equity, and I say it is void there too; but when I say void there, I do not mean that this court will not go as far as possible to supply a defect in the execution of such a power (3).

A court of equity will supply a *defective* execution of powers, as well in the case of younger children and a provision for a wife, as in favour of purchasers or creditors.

In the present case, neither of the parties can possibly have what was originally intended them by the power; for in respect of Mr. *Michael Hervey*, the defendant, it is contrary to what was stipulated between him and his father; for here is a clear rent-charge issuing out of his estate, instead of being subject to taxes, *&c.* and in respect to the plaintiff, there is not what was stipulated for her, because the power will not extend to give a clear rent-charge.

It has been rightly observed by the bar, that a court of equity will supply a *defective* execution of powers, as well in the case of younger children and a provision for a wife, as in favour of purchasers or creditors (4).

But the counsel for the defendant insist, that this relief is applicable only to a wife unprovided for, and that here the wife is provided for by the settlement previous to the marriage.

(1) But this is expressly contrary to the recital and declaration in the deed of the 15 *Jan.* 1731.

(2) *Co. Lit.* 36. b. 4 *Co.* 1. b. 2 a.

(3) *Churchman* v. *Harvey*, *Amb.* 335.

(4) So *Pollard* v. *Grenvill*, 1 *Cha. Rep.* 184. 1 *Cha. Ca.* 10. S. C. *Smith* v. *Ashton*, 1 *Cha. Ca.* 263. 1 *Freem.* 308. S. C. *Fothergill* v. *Fothergill*, 2 *Freem.* 256. *Sarth* v. *Blanfrey*, *Gilb. Rep.* 166. *Coventry* v. *Coventry*, 2 *P. W.* 222. 1 *Stra.* 596. S. C. *Tollet* v. *Tollet*, 2 *P. W.* 489. *Cotter* v. *Layer*, 2 *P. W.* 622. *Holt* v. *Holt*, 2 *P. W.* 648. *Sergeson* v. *Sealey*, *post*, 2 vol. 414. *Tryconnel* v. *Ancaster*, 2 *Ves.* 500. *Wade* v. *Paget*, 1 *Bro. Cha. Rep.* 363. *Sneed* v. *Sneed*, *Amb.* 64. *secus* as to the *non-execution* of a power. *Arundel* v. *Phelpot*, 2 *Vern.* 69. 3 *Cha Ca.* 70. S. C. *Piggot* v. *Penrice*, *Com.* 250. *Coventry* v. *Coventry*, 2 *P. W.* 227. *Tollet* v. *Tollet*, 2 *P. W.* 490. *M'Adam* v. *Logan*, 3 *Bro. Cha. Rep.* 310.

HERVEY v. HERVEY. But as the whole which has been done in this cafe is directly contrary to the power, fhe muft be looked upon as a wife unprovided for.

The cafe of *Smith* and *Afhton*, *Cha. Ca.* 263. (1) and *Tollet* and *Tollet*, 1 *Wms.* 489. before the late Sir *Jofeph Jekyll*, fufficiently prove, that where powers are defectively executed, this court will fupply them notwithftanding.

Upon thefe authorities, and many more which might be mentioned, there can be no doubt but if a tenant for life, who has fuch a power, does after marriage execute the power, tho' *defectively*, yet it fhall be fupplied.

I am of opinion here, that the wife cannot have what was ftipulated for her, previous to her marriage, carried into execution; for if I fhould fo decree, it would be breaking in upon the agreement under the deed between *Edward* and *Michael Hervey*.

Then taking it upon this footing, fhe muft be confidered as a wife unprovided for; and if fo, fhe is clearly intitled to the relief of this court, according to the authorities before mentioned. This cafe, in fome refpects, differs from any other that has been cited, *viz.* *Bath* and *Mountague*, *Select Ca. in Chanc.* 55. 2 *Ch. Rep.* 417, *&c.* becaufe in them there was a provifion, but a defective one.

Then it falls pretty much within the rules of a wife, or child unprovided for, by defective provifions, under a will; and to [564] this purpofe the cafe of *Weeks* and *Urn*, decreed by Lord *Cowper* 1717, is applicable.

One reafon that weighs greatly with me in the decree I am going to make, is this, That if the wife had claimed the 600 *l.* *per ann.* without fetting forth any confideration, but merely as a voluntary gift from her hufband, there is no doubt but the court would have given it her, and it would be very abfurd to fay, that becaufe fhe fets forth in her bill, a valuable confideration for a part, therefore fhe fhall lofe the whole.

If there had been any proof in this caufe of her ufing unwarrantable means to infinuate herfelf into the favour of an old man, and, by impofing upon his weaknefs, had gained any thing clandeftinely, it might have had fome weight; but, in the prefent cafe, there is not fo much as a fuggeftion of this kind, and befides too, fhe brought a confiderable fortune in marriage.

The main argument in Lord *Coventry*'s cafe (2) was, that there was a non-execution of the power, but there has always been a diftinction between a non-execution, and a defective execution of a power.

Here the declaratory claufe in the laft deed has fupplied any defects that might be in the former, and the natural confequence of this is, that the parties waive all benefit which might accrue

(1) 1 *Freem.* 308. S. C. 3 *Keb.* 554. S. C. 3 *Salk.* 277. S. C. *Rep. temp. Finch* 273.

(2) 1 *P. W.* 222. S. C. *Stra.* 596. S. C. 9 *Mod.* 12. S. C. *Maxims in Equity*, laft cafe.

2 to

to them from the other settlements, and are contented with the provision that is made pursuant to the power. Hervey v. Hervey.

That clause which impowers the son to hold the estate, provided he pays 600 *l. per ann.* neat, to the trustees for the wife, is not within the power, and consequently void, and no conveyance can be pursuant to the power, but what is *to the wife* herself only.

I must therefore decree (1) that *Michael Hervey*, and the other defendants the trustees, do convey and assure to the plaintiff, a jointure not exceeding 600 *l. per ann.* and that the Master shall out of the manor subject to the power, take such lands as shall be sufficient for that purpose, but to be made liable to taxes, repairs, &c. in the same manner with other landed estates, and the plaintiff to hold and enjoy the said lands against the defendant, and all other persons during her life.

This cause was reheard on the 21st of *July* 1740.

Mr. *Noel* counsel for the defendant *Michael Hervey* argued, That as the portion which the plaintiff brought in marriage, was only 2000 *l.* that the settlement of 300 *l. per annum* is much more than adequate to that fortune.

Lord Chancellor still continuing of his former opinion, confirmed his decree *in toto.*

He insisted that the first settlement is such an appointment, both in law and equity, as is a full and absolute performance of the power reserved under the settlement, made upon the marriage of the defendant *Michael Hervey*, and therefore that the second deed, executed after the marriage of *Edward Hervey* with the plaintiff, ought to be considered as merely voluntary.

The conveyance to the intended wife under the first deed was to trustees; it has been objected that it ought to have been a legal conveyance of a legal estate to the wife herself, and therefore the conveyance to trustees is improper. [565]

To which I answer, that by the power the father was to have a liberty of making such a jointure or provision, as did not exceed the rents and profits of an estate of 600 *l. per ann.* and tho', as an express estate has not been limited to the wife herself for life, it is not properly a jointure, yet in this court, by way of provision, it may be construed a due performance of the power.

For, *First*, It is a good execution of the power at law.

Secondly, If not good at law, it is certainly in equity.

Under the deed of 1725, it was agreed between *Edward Hervey* the father, and his intended wife the plaintiff, that after the rent-charge of 300 *l.* a year out of an estate of 600 *l.* a year, the residue of the rents and profits should go to his son the defendant *Michael Hervey*.

Therefore, as these are parties able to contract in a court of equity, this must be considered as good, by way of agreement,

(1) That the plaintiff is intitled to have the said 600 *l.* made good out of the lands in question according to the power in the settlement of the 23d *July* 1715. *Reg. Lib. A.* 1739. fol. 278.

and

HERVEY *v.* HERVEY. and any further addition which the wife had after the marriage, must be considered merely as a bounty, and for so much she is only a volunteer.

He cited *Scrope* and *Offley* (1) in the House of Lords the 24th of *March* 1735-6, in order to shew, by that case, that the court, where a wife is provided for before, will not aid and assist the defective execution of a power under any second settlement.

I do likewise insist, that the trustees were equally trustees for Mr. *Michael Hervey* the son, as for the wife of *Edward Hervey* the father, and that, as the estate was then out of the father and in the trustees, if they had conveyed according to the trust, it would have been no breach of their duty.

The second settlement gives a rent-charge of 600 *l.* a year, which is bad in substance, because it is impossible an estate of 600 *l. per ann.* in land, can produce a neat sum of 600 *l.* and where a person has exceeded all bounds of his power, I do not know that this court hath, in any instance, reduced that excess within the true limits of the power, but has been always held a void execution of the power.

It has been objected, that the wife claimed part as a volunteer, and part as a purchaser, and therefore it would be hard to say, in a court of equity, that when a person is allowedly a purchaser for part, this court will not supply the defective execution of a power.

To this I answer, that under the first settlement, the plaintiff was certainly a purchaser for a valuable consideration, by virtue of her fortune of 2000 *l.* but that the settlement of 1731 is separate and independent from the former, and she was there only a volunteer.

The case principally relied on by the other side is *Tollet* and *Tollet*, 2 *Wms.* but there is a very material one for the defendant, and which was not mentioned at the former hearing, the case of *Layer* and *Cotter*, 1 *Wms.* 623. and heard before Lord Chan- [566] cellor *King* in 1731, where it is laid down, that equity will aid a defective execution of a power, *provided it is for a valuable consideration.*

Upon the whole, he insisted that the present is a new case, and no authority whatever cited that comes up to it.

Mr. *Wilbraham* of the same side.

The question is, Whether the first settlement is good in law and equity.

Secondly, If it be good in law and equity, whether this court will supply a defective execution of a power, under a second or third settlement, where they are undeniably bad in law; he cited the case of *Newport* and *Savage*, before Lord Chancellor *Talbot*, and *Thwaytes* against *Dye*, 2 *Vern.* 80. to shew,

(1) S. C. 4 *Bro. P. C.* 537.

that

that where a person has a power of charging lands to such of his children, and in such shares and proportions, as he by any writing shall appoint; he may not only limit the land to any of his children, but may charge the lands with any rent-charge, or sum of money, for any of his children.

80*l. per ann.* rent-charge, is looked upon by conveyancers as a reasonable provision for a portion of 1000*l.* and if the settlement in the present case had been 320*l. per ann.* clear, it would have been double the provision that is usual for it: being four times 80*l. per annum.*

Mr. *Attorney General* for the plaintiff said,

That under the settlement, in which Mr. *Hervey* the father reserved this power, he may be called a purchaser of it from the son, the defendant *Michael Hervey*, because he absolutely gave up an estate, in which he had his life, to the son immediately in possession.

It is admitted by the counsel on all sides, that the power is not well executed in law, under the settlement of 1725, therefore the execution of the power is void, but equity will supply a defect in the execution, and cited the case of *Kettle* v. *Townshend*, 1 *Salk.* 187. where it was held, that equity will supply a defect, in favour of a son or daughter, and that it is not material that such a son was provided for before, nor how far.

Mr. *Murray* of the same side.

This is a power that may be executed piece-meal, part at one time, and part at another (1).

If a wife had any former provision, that is defective under the execution of a power, the counsel for the defendant take it for granted, without producing any instance, or even a *dictum* of the court, that equity will not supply any defect in a latter provision for the benefit of a wife.

He cited the case of *Watts* v. *Bullas*, 1 *Wms.* 60. to shew that a voluntary conveyance made to a brother of the half blood, tho' void and defective at law, will be made good by a court of equity; and that as the consideration of blood would at common law raise a use, and as before the statute of the 27 *H.* 8. such *cestui que use* might have compelled an execution of the use in a court of equity, so would this imperfect conveyance raise a trust, and consequently ought to be made good in equity. [567]

Lord Chancellor: As this case is attended with some particular circumstances, I am not sorry it has been re-heard; for

(1) See *Zouch* v. *Woolston*, 2 *Burr.* 1136. *Doe* v. *Milborne*, 2 *Durn.* and *East* 721.

HERVEY v. HERVEY.

if I had feen any reafon to have changed my opinion, I fhould not have been afhamed of doing it, but after hearing it fully argued on the part of the defendants, I ftill continue of the fame opinion.

I will not repeat what I faid before, but rather apply myfelf to give an anfwer to what feems to be the principal reafon urged for a re-hearing.

The general argument is, the validity of the firft fettlement, at leaft in a court of equity; but I take it to be clear, that the deed of 1731, which is the ultimate attempt towards the execution of the power, is a waiver of the former fettlements, and fupplies any defects that might be in the other two.

In aiding the defective execution of a power, either for a wife or child, it's being intended for a provifion, whether voluntary or not, will intitle this court to carry into execution.

In cafes of aiding the defective execution of a power, either for a wife or a child, whether the provifion has been for a valuable confideration, has never entred into the view of the court; but being intended for a provifion, whether voluntary or not, has been always held to intitle this court to give aid to a wife or child, to carry it into execution, tho' defectively made.

I am of opinion, if this power had been executed in favour of a ftranger, it would have been good; but being merely an equitable thing, the perfon claiming muft have come into a court of equity.

With regard to the deed of *May*, 1725, it has been faid, the power being completely executed, that it cannot be executed *toties quoties*, but I am of opinion, that the power is not executed either in law or equity.

Suppofing it had been defectively executed, and the parties afterwards execute it properly, there is no doubt but the law would look upon the firft execution as null and void, and that it might therefore be executed over again.

If there had been words in the firft fettlement, which fhewed that Mr. *Edward Hervey* had fully executed the power, or would have amounted to a releafe of it, it would indeed have prevented any fubfequent execution; but there are no words, except what are ufually put in by fcriveners, namely, in bar of dower and thirds.

Nothing is to be inferred from the words, *the furplus I give to the remainder-man*, for they are only of courfe, and if not expreffed, he would have had the furplus by implication.

The cafe of *Scroop* and *Offley* differs *toto cœlo*, for there a covenant was entered into by the hufband for a valuable confideration upon the firft marriage, that the iffue of that marriage fhould enjoy, free from any incumbrance done, or to be done, fo that he was tied down by that claufe.

It has been further urged by the defendant's counfel, that fuppofing the 300 *l. per ann.* be not a good and complete execution of the power, yet it is fuch an execution of the power, as will induce the court to think a wife, in fome meafure, provided for under it.

This

This is relied upon as the strong point. I am of opinion that the rule, as laid down by the defendant's counsel, that a wife or child, who come for the aid of this court, to supply a defective execution of a power, must be intirely unprovided for, is not the right rule of the court.

HERVEY v. HERVEY. That a *wife or child*, who come for the aid of this court to supply a defective execution of a power, must be totally unprovided for is not the right rule.

I think the general rule, that the husband or a father are the proper judges, what is the reasonable provision for a wife or child, is a good and invariable rule.

And when a father has done any thing extravagant, in either of these cases, the court does not break thro' this general rule, when they set it aside, but they go upon a collateral reason, that this extravagant provision, either for a wife or one child only, is a prejudice and injury to the rest of the family, and that one branch ought not to be improperly preferred to the ruin of the rest.

In lady *Oxford*'s case, mentioned in *Smith* and *Ashton*, 1 *Ch. Ca.* 263. her jointure was decreed good, where the power was not pursued, tho' only a part of her jointure depended on the question.

I will, in the next place, consider it as if the rule laid down by the defendant's counsel was a right one, and then it will come to this question, Whether she is a wife provided for under the settlement.

And I am of opinion, that as the court cannot carry it into execution, according to the intent and meaning of the parties, she cannot be said to be a wife provided for.

As this is a power to make a jointure of lands only, not exceeding 600*l.* *per ann.* it was not the intent that the whole estate should be incumbred, for the remainder-man was to have the surplus, which he will not have, if the 300*l.* *per ann.* rent-charge should take place, for then the whole will be liable to answer the rent-charge, and by that means the remainder-man will lose his surplus.

But then it has been said, the court might have taken 600*l.* *per ann*, out of the 900*l.* *per ann.* to answer this rent-charge.

But suppose this estate had lain in the level or marsh grounds, there might have been inundations, and then the part so allotted might not even have produced a rent-charge of 300*l.*

This would have been a prejudice too, in respect of subsequent remainder-men; for supposing the 600*l.* a year had, by any accident, proved an insufficient fund, then the arrears of the rent-charge would have run on, and the remainder-man, at least, who stands behind *Michael Hervey*, would have been injured.

I agree, if there had been no settlement besides the deed of 1725, the court would have found out some other way to make the provision for the wife effectual, and might, perhaps, have done what Mr. *Noel* has pointed out, allotted so much of the estate, which was subject to the power, as would have been

 sufficient

HERVEY *v.* HERVEY. sufficient to have answered a clear neat sum of 300*l.* annually, making an allowance for landed estates being liable to taxes.

But I am of opinion, whatever the court might have done under the deed of 1725, to aid and assist the wife, if it had stood [569] singly, and clear of subsequent settlements, yet as the case is now circumstanced, if the court cannot give her what is agreed and stipulated for, under this deed, they will certainly secure to her what is given under the settlement of 1731.

As the plaintiff has not the provision stipulated for her, she must be considered as totally unprovided for.

And as this is a rent-charge, and not such a provision as is stipulated for the wife, she must be considered as absolutely unprovided for, and then she will clearly be intitled, according to the rules of equity, to be aided and assisted in carrying a defective provision into execution.

Where there has been an excess in the execution of a power, this is void but for the surplus, and good within the limits of the power.

It has been said, where there has been an excess in the execution of a power, that there are no instances where the court have assisted to carry such a case into execution, but though there is an excess or redundancy in the thing itself, yet it must be considered only as a defect in the legality; and there are many cases to this purpose, and I will put one; suppose a power to lease for 21 years, and the person leases for 40, this is void only for the surplus, and good within the limits of the power (1).

It is surprizing to me, how the person who drew this settlement could mistake, when he had so plain a power for his guide; but he does not seem to have committed blunders so much as wilful mistakes, with a view to try experiments, like Serjeant *Maynard's* conclusions, in some of the clauses of his will, *valeat quantum valere potest*.

Upon the whole, I am of opinion that the settlement in 1725, being drawn in such a manner as that the wife could not have what was intended for her, did not annul or defeat the last settlement, and therefore do direct that my former decree shall stand without any variation (2).

(1) So *Parry* v. *Bowen*, *Nelf. Rep.* 87. 2 *Vef.* 644.

(2) *Reg. Lib. A.* 1739. fol. 507.

Vide title *Charity*.

Vide title *Dower and Jointure*.

C A P XCIV.

Process.

Vide title *Arrest.*

C A P. XCV. [570]

Prochein Amy.

February the 13th, 1737. At the Rolls.

Anon.'

A *Prochein Amy* need not be a relation, but then he must be a person of substance, because liable to costs. Case 265.

C A P. XCVI.

Prohibition.

Vide title *Marriage.*

C A P. XCVII.

Purchase.

(A) *Of Purchases without Notice.*

(B) *Whether Lands purchased after a Will, pass by it.*

(A) Of Purchasers without Notice.

November the 15th, 1738.

Brandlyn v. *Ord.*

Case 266.

A man who purchases for a valuable consideration with notice of a voluntary settlement, *from a person who bought without notice*, shall shelter himself under the first purchaser (1).

IT was said by *Lord Chancellor* in this cause, that a man who purchases for a valuable consideration, with notice of a voluntary settlement from a person *who bought without notice*, shall shelter himself under the first purchaser, yet it must be the very same interest in every respect.

A man cannot defend himself in this court, as a purchaser for a valuable consideration, under articles only (2).

He likewise said, he never knew a man defend himself in this court, as a purchaser for a valuable consideration under articles only; if he is injured, he must sue at law upon the covenants in the articles.

Where defendants plead a former suit, they must shew it was *res judicata*.

His Lordship also laid it down as a rule, that where the defendants *plead a former suit*, that the court implied there was no title when they dismissed the bill, is not sufficient, they must shew it was *res judicata*, an absolute determination in the court that the plaintiff had no title.

A tenant in tail, out of possession, cannot bring a bill to perpetuate testimony.

He also held, that a tenant in tail, out of possession, cannot bring a bill to perpetuate testimony of witnesses, till he has recovered possession by ejectment; if he does, on the defendant's demurring for this reason, the court will allow it (3).

A bill dropped for want of prosecution, is never to be pleaded as a decree of dismission.

And that a bill dropped for want of prosecution is never to be pleaded as a decree of dismission in bar to another bill.

And that a fine levied by termor for years, is a forfeiture; but the reversioner has five years after the expiration of the term to enter (4).

(1) See *Sweet* v. *Southcote*, 2 *Bro. Cha. Rep.* 66. *Lowther* v. *Carlton*, *post.* 2 vol. 242.

(2) See *Fitzgerald* v. *Fauconberge*, *Fitzgib.* 207. *Hart* v. *Middlehurst*, *post.* 3 vol. 377.

(3) *Parry* v. *Rogers*, 1 *Vern.* 441. *Phillips* v. *Carew*, 1 *P. W.* 117.

(4) The reader is referred to the *Essay on Uses and Trusts*, 320, to 325. See also *Smith* v. *Clifford*, 1 *Du East*, 738, with respect to a *recovery* suffered by a termor for years and a tenant for life.

November the 30th, 1739.

At the Rolls. Anon.

Case 267. S. C. ante 88.

New assignees under a commission of bankruptcy, on filing a supplemental bill, shall have the benefit of the proceedings in the suit commenced by the old assignees.

THE question before the court was, Whether new assignees, under a commission of bankruptcy upon the death or removal of the former, shall, on filing a supplemental bill, be in-

titled to the benefit of the proceedings in a suit begun in the time of the first assignees, or must begin again by original bill? ANON.

Master of the Rolls: In the case of an abatement, if you can, you must revive; but in the case of assignees of bankrupts, where some die, or some are discharged, and others are by order of court put in their room, there is no privity between the bankrupt and the assignees, or at least but an artificial one, and therefore they cannot revive; and it would be extremely hard if there have been pleadings, examinations, &c. in a former suit, that the new trustees should not have the benefit of them by a supplemental bill.

Suppose the court, upon the death or discharge of assignees, of bankrupts, should say that all must go for nothing, and you must begin again by original suit, why then all the charges and expences in the former suit are absolutely thrown away.

In the present method, though you cannot come against the representative of the former assignee, yet by a supplemental bill you will have the bankrupt's estate liable, at all events, to answer the costs.

I will put a case that comes very near this, and will shew the reasonableness of my present determination, Suppose an estate has been in controversy for twenty years in this court, and during the suit it is purchased, the purchaser, on filing his supplemental bill, comes into this court *pro bono et malo*, and shall be liable to all the costs in the proceedings, from the beginning to the end of the suit. For these reasons I am of opinion, that the new assignees ought to have the benefit of the former proceedings in the suit commenced by the old assignees (1).

A purchaser of an estate, after it has been in controversy in this court, on filing his supplemental bill, comes here *pro bono et malo*, and is liable to all costs, from the beginning to the end of the suit.

(1) See *Anon. ante* 263.

(B) *Whether Lands purchased after a Will pass by it.*

Green v. *Smith.* On Exceptions.

December the 15th, 1738.

Case 268.

A. Articles for the purchase of lands, and dies; it happened afterwards that the seller could not make a good title to the lands, and the question was between the heir at law, and the executor of *A.* Whether the purchase money was to be considered as land or personal estate?

If a man covenants to lay out a sum in the purchase of lands, and devises his real estate before he has made such purchase, the money to be laid out will pass to the devisee.

Lord Chancellor, in this cause, laid down the following rules:

That agreements to be performed, are often considered as performed: for if a man *covenants* to lay out a sum of money in the purchase of lands, generally, and devises his real estate before

Green v. Smith.

fore he has made such purchase, the money *agreed* to be laid out will pass to the devisee (1).

Where a person contracts for a purchase of lands after a will made, they will not pass thereby, but descend to the heir at law.

That where a man having made his will, afterwards enters into a contract for the purchase of land, the lands contracted for will not pass by the will, but descend to the heir at law (2).

Where after making a will a person agrees for the purchase of particular lands, if a good title cannot be made, as the heir at law cannot have the land, he shall not have the money intended to be laid out.

That where an ancestor, after the making of a will, agrees for the purchase of particular lands, the heir at law would have a right to them, provided a good title can be made, otherwise if it cannot; but it is going too far to say that though the heir at law cannot have the land, yet he shall have the money so intended to be laid out (3).

That if a man gives a portion to his daughter by a will, and afterwards advances her with the like sum, it shall go in ademption of the legacy (4).

That *the vendor* of the estate is, from the time of his contract, considered as a trustee for the purchaser, and *the vendee*, as to the money, a trustee for the vendor (5).

That in bills for specifick performance, this court never gives relief where the act is impossible to be done, but leaves the party to his remedy at law.

That where an ancestor has agreed for the purchase of particular lands, but dies before it is quite compleated, if the heir at law brings his bill against the devisees, who claim the real estate of the ancestor by a will made before the purchase of those particular lands, the vendor of these lands, where he has a doubtful title, must be made a defendant to the suit, otherwise if his title be clear.

(1) *Milner* v. *Mills*, *Mos.* 123. *Greenhill* v. *Greenhill*, *Pre. Cha.* 320. *Lingen* v. *Sowray*, 1 *P W.* 172. 3 *P. W.* 221. S. C. cited. *Potter* v. *Potter*, 1 *Ves.* 437. *Beauclerk* v. *Mead*, *post.* 2 vol. 169. *Oldham* v. *Hughes*, *post.* 2 vol. 453. *Pullyn* v. *Ready*, *post.* 2 vol. 590. *Whittaker* v. *Whittaker*, 4 *Bro. Cha. Rep.* 31. See [illegible] *Guidot* v. *Guidot*, *post.* 3 vol. 254.

[illegible]) *Langford* v. *Pitt*, 2 *P. W.* 629. [illegible] v. *Alleyn*, *Mos.* 262. *Sed vide* *Cotton* v. *Cotton*, 2 *Cha. Rep.* 138.

(3) Therefore his Lordship saw no ground for giving directions to perform the agreement or to pay over the purchase money. *Reg. Lib. A.* 1738. fol. 265.

(4) See *Bellasis* v. *Uthwatt*, *ante* 426. *note* 2.

(5) *Vide Pollexfen* v. *Moore*, *post.* 3 vol. 273.

Vide title *Agreements, Articles, and Covenants.*

Vide title *Bankrupt, under the Division, Rule as to Assignees.*

Anon' at the Rolls. M. T. 1739.

C A P. XCVIII.

Real Eſtate.

(A) *Where the Perſonal ſhall not be applied in Exoneration.*

November the 4th, 1738. At the Rolls.

Miles v. *Leigh.*

HENRY *Leigh*, the plaintiff's father, being ſeiſed of a meſſuage called *Hills*, and of another meſſuage called *Boreys* (1), with lands in *Somerſetſhire* of 50*l.* a year, and alſo poſſeſſed of perſonal eſtate, made his will the 23d of *March* 1701, and in the outſet thereof ſays, " *All my worldly goods* I give to " *Joan* my wife, and the premiſſes aforeſaid he deviſes to her " for life, and then to his ſon *Robert*, brother of the plaintiff, " and his heirs for ever; *and to the plaintiff, by the name of his* " *daughter* Mary, *a legacy of* 150l. *to be paid her in a twelvemonth's* " *time after his ſon* Robert *ſhould come to enjoy the premiſſes, and if* " Robert *ſhould die before* Joan, *then that* Henry, *another ſon, and* " *the brother of the plaintiff, coming to the poſſeſſion of the premiſſes,* " *and ſurviving his mother, ſhould pay to the plaintiff* 200l. *and* " *made* Joan *executrix.*"

Caſe 269.

S. C. 4 Vin. Abr. 463. pl. 21. 8 Vin. Abr. 295. pl. 14. 347. pl. 3. n.

H. L. the plaintiff's father, being ſeiſed in fee of ſeveral lands, deviſes them to his wife for life, and then to his ſon *Robert* and his heirs, *and gave to the plaintiff a legacy of* 150l. *to be paid to her in a twelve month's time after his ſon* Robert *ſhould come to enjoy the premiſſes*; and if *Robert* died before his mother, then that *Henry*, another ſon, coming to the poſſeſſion thereof, and ſurviving his mother, ſhould pay the plaintiff 200*l.*

Robert and *Henry* died before *Joan*, but *Robert* left a ſon, the defendant *Henry Leigh*, and nephew to the plaintiff, to whom ſhe applied for the legacy, and, upon his refuſing payment, brought her bill againſt him to pay what is her due for the legacy, or, in default thereof, that the defendant may deliver poſſeſſion of the premiſſes.

Robert and *Henry* died before the mother, but *Robert* left a ſon the defendant, againſt whom the bill is brought for the legacy.

The Maſter of the Rolls decreed, that it be referred to a Maſter to ſee what is due to the plaintiff, for her legacy of 150*l.* and to compute intereſt at 4*l. per cent.* from a year after the death of *Joan Leigh*, and the defendant to pay what ſhould be found due, or in default thereof the defendant is to account for the rents of *Hills tenement*, and that *Hills tenement* be ſold (2).

A decree for the legacy at the Rolls, with intereſt at 4 *per cent.* from a year after the death of the mother, and, upon appeal to *Lord Chancellor*, decree affirmed.

(1) The teſtator was ſeiſed of this meſſuage *in tail.*

(2) As to the meſſuage called *Boreys*, the bill was diſmiſſed. *Reg. Lib. B.* 1738. *fol.* 83.

Miles *v.* Leigh.

On the 25th of *July* 1739, this cause came on before *his Lordship*, upon an appeal from the decree of the *Master of the Rolls*.

Lord Chancellor: I think the will obscurely penned, but the construction must be agreeable to the intent of the whole will taken together; and upon that consideration I am of opinion the decree at the Rolls is right.

The words the testator uses in the disposition of his personal estate, *wordly goods*, are an extensive description thereof; and then the first question will be, Whether, by the words and intent of the testator, the legacy is a charge on the real estate?

Conditions in wills are often construed so, from the nature of the thing itself, where the words merely of themselves are not conditional.

I am of opinion it is, and that no other part of the estate, but the real, is charged with it; the testator breaks the descent, and his son *Robert* takes only a remainder under the will, and the clause of the legacy to his daughter *Mary* is to be construed just as if it had followed the clause of the devise to *Robert* and his heirs, and therefore is a *condition* annexed to the estate, and conditions in wills are often construed so from the nature of the thing itself, where the words merely of themselves are not *conditional*, as in the case of adverbs of time, and here are adverbs of time directing the particular time of payment, and the word *then* has often been construed *a condition*.

It is objected, *that it is not said to be paid out of the estate at Hills*, nor is it said by whom it is to be paid.

[575]

Tho' a legacy is not expresly said to be paid out of an estate, nor by whom, yet has been considered as a charge thereon, where the general intent of the testator has appeared.

But there are many cases where it is neither said to be paid out of the estate, nor by whom, yet has been considered as a charge upon the estate, where the general intent of the testator has appeared; but here the whole will being taken together, the subsequent clause directing *Henry* to pay, he coming into possession, &c. is a plain declaration of the testator's intent, that the person who possessed the estate should pay the legacy.

The testator intended it should come out of both estates, and he has charged his son, in respect of the whole estate he was to have; and that is generally the rule of proportion in charging the son for younger children's fortunes, in respect of the value of the whole estate that is to come to him. The words are, I think, sufficient to charge the real estate; and as to the personal, it is given absolutely and intirely to the mother; she might spend it, or do what she pleased with it; nor is the legacy given to be paid at the particular time of the death of the mother, so that it is impossible to imagine that could be the fund intended by the testator (1).

A condition will bind the heir, if the devise so takes effect as that he must claim under the ancestor, as much as if the ancestor had taken in possession.

The second question is, Whether the plaintiff's legacy is a contingent charge? For it has been insisted on by the defendant's

(1) See *Walker* v. *Jackson*, *post.* 2 vol. 624.

ant's counsel, that it depended on the contingency of *Robert*'s personally enjoying the premisses; but the construction must be, when the devise to *Robert* takes effect, and the present defendant claims under *Robert*, and the condition will bind the heir, if the devise so takes effect as that he must claim under the ancestor, as much as if the ancestor himself had taken in possession (1). Miles v. Leigh.

As to the satisfaction said to be received by the plaintiff from the mother, that depends on the question, Whether this was a legacy payable out of the personal estate? But this never was so, nor was the personal estate liable, for if it had been intended, there would have been no occasion to postpone the payment of the legacy, till the estates called *Boreys* and *Hills* came into possession.

Decree affirmed (2).

(1) See *Marks* v. *Marks*, 1 *Stra.* 129. 1 *Vef.* 46.

(2) *Reg. Lib. B.* 1738. *fol.* 351.

Burgoigne v. *Fox* and Others. *May* the 13th, 1738.

Case 270.

The 10,000*l.* charged by Lord *Bingley*, on the term of 1000 years, shall not be paid out of his personal estate, but the land on which it was originally charged must bear the burthen of it.

ON the marriage of Lord *Bingley* with a daughter of Lord *Guernsey*, a settlement was made of his estate in *Yorkshire*, to the common uses of a marriage settlement, and in case of failure of issue male, a term of 1000 years was created for raising the sum of 10,000*l.* for daughter's portions.

Lord *Bingley* afterwards, by lease and release, dated the 25th and 26th of *August* 1714, conveys an estate he had in *Hertfordshire*, called *The Nunnery of Cheshunt*, to the use of himself for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail, remainder to *Samuel Benson* (a near relation) for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail, remainder to the right heirs of Lord *Bingley*, subject to a power of revocation by any deed or writing under the hand and seal of Lord *Bingley*, and attested by two or more witnesses, so as, at the time of such revocation, he settles other land in *Yorkshire*, free from all incumbrances, and of as good or better yearly value than the estate at *Cheshunt*, to the same uses as are mentioned in the deed of 1714. [576]

Lord *Bingley* afterwards, by his will dated the 17th of *June* 1729, "devises to the present plaintiff an estate for life, in the "lands, &c. at *Cheshunt*; and all his lands in *Yorkshire*, and "elsewhere, he devises to trustees, for the benefit of his daugh-"ter and only child, (since married to Mr. *Fox* the defendant) "for life, remainder to the first and other sons in tail, remainder "over, &c."

After-

BURGOIGNE *v.* FOX. Afterwards Lord *Bingley*, by lease and release, of the 29th and 30th of *June* 1730, intended by him as an execution of the power of revocation in the deeds of 1714, conveys an estate at *Hatton* in *Yorkshire*, to the same uses with the deeds in 1714.

But this estate was deficient in value, and was likewise charged with the term of 1000 years, under a deed in 1703, for raising 10,000 *l.* for daughters' portions.

After the death of Lord *Bingley*, a bill was brought, and decree obtained by consent, for charging Lord *Bingley*'s personal estate with this 10,000*l.* portion, which was done to avoid circuity, the testator having by his will, directed his personal estate, which was very considerable, to be laid out in the purchase of lands, to be settled to the uses mentioned in his will as to the other lands.

Samuel Benson died, and *Robert* his son refusing to accept of the estate at *Hatton*, under the deed of 1730, and having recovered the *Cheshunt* estate by ejectment, the bill was now brought by the plaintiff, praying, in the alternative, either that *Robert Benson* may be compelled to relinquish his claim to the *Cheshunt* estate, and accept that of *Hatton*, upon a supposition that the power of revocation was equitably, though not legally pursued; or, that if that should be thought otherwise, that the plaintiff may have the *Hatton* estate, which appeared to be conveyed to *Robert Benson*, in lieu of the *Cheshunt* estate, or at least to have a satisfaction and equivalent for this devise out of the personal estate of the testator, in respect of a covenant entered into by him in the deed of 1730, that the *Hatton* estate then was, and should continue during the interest of *Samuel Benson* therein, of the clear value of 120*l. per ann.* which was the value of the *Cheshunt* estate at the time of the settlement thereof in 1714.

Lord Chancellor: I am clearly of opinion the power of revocation was not well executed in respect of the difference of the [577] value of the two estates, and the term of 1000 years which covered *Hatton* as part of the *Yorkshire* estate settled in 1703.

I am likewise clearly of opinion, that the deed of 1730 was a revocation of the will, *quoad* the devise of the *Hatton* estate, as part of all the testator's lands, *&c.* in *Yorkshire*, mentioned to be devised by the will, and therefore *Hatton* could not be subject to the particular uses created by the will. *Vide Shower's Parl. Ca.* 150.

But as it was admitted, that tho' *Robert Benson* had the legal estate both in *Cheshunt* and *Hatton* estates, the former under the settlement in 1714, and the other in 1730, yet as one only was plainly intended him, and he chuses to adhere to the *Cheshunt*, &c. he must be a trustee as to the other estates, for some person or other who in equity has a right to it, and I think the heir at law of the testator will plainly be intitled to this trust; and the principal question therefore is, as between the plaintiff and the heir at law.

And

And as the plaintiff claims only under the will, and is therefore a mere volunteer, he is not intitled to any equity of this kind. Burgoigne v. Fox.

That in the case of *Noys* v. *Mordaunt*, 2 *Vern.* 581. it is plain Lord *Cowper* went upon this, a provision which was thereby to be made by a father for his child; and it is likewise in this respect distinguishable, that the dispute there was between persons who claimed under the same will, here between a devisee and the heir at law, who is always favoured.

In *Reeve* v. *Reeve*, 1 *Vern.* 219. particular notice was taken by the testator, in his will, of his apprehension that the 3000*l.* charge would be good against the jointure. No express intention of any thing of that kind appears in the present case. Here it was likewise to make provision for an only daughter, and no inference can be drawn from those resolutions, in favour of a mere volunteer, as the plaintiff is.

N. B. Held clearly by *Lord Chancellor*, there was no pretence for paying off the 10,000*l.* charged on the term of 1000 years, out of the personal estate of Lord *Bingley*, but the land on which it was originally charged must bear the burthen of it; and what was done by the decree in this case could be only matter of agreement between the parties (1.)

His Lordship declared he saw no cause to give the plaintiff any relief in equity, and therefore ordered that the matter of the plaintiff's bill stand dismissed without costs.

(1) See *Coventry* v. *Coventry*, 2 *P. W.* 222. *Evelyn* v. *Evelyn*, Cox's 2 *P. W.* 664. note 1. *Lang* v. *Abel*, *post.* 2 vol. 441. *Tankerville* v. *Fawcett*, 2 *Bro. Cha.* Rep. 57. *Ward* v. *Dudley*, 2 *Bro. Cha.* Rep. 316. *Howel* v. *Price*, 1 *Cox's P. W.* 294. note 1. *Galton* v. *Hancock*, *post.* 2 vol. 435, 439. and notes.

CAP. XCIX. [578]

Receiver.

(A) *Rule as to Appointing him.*

Anon'. *May* the 31st, 1738.

LORD *Chancellor:* There is no instance of appointing a receiver of the rents and profits of an infant's estate, where there is no bill depending in this court; if it had been only filed, there might have been an application for this purpose on behalf of the infant (1). Case 271. S. C. ante 489. The court will not appoint a receiver of an infant's estate, where there is no bill filed.

(1) *Ex parte Whitfield*, *post.* 2 vol. 315.

Vide title *Infant.* May the 31st, 1738.

CAP. C.

Recoveries.

Vide title *Agreements, Articles, and Covenants, under the Division, when to be performed in Specie.*

Vide title *Fines and Recoveries.*

CAP. CI.

Relations.

Vide title *Exposition of Words.*

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[579]

CAP. CII.

Remainder.

July the 17th, 1738.

Eleanor Davenport Widow, one of the Daughters of *Margaretta Farmer*, Widow, deceased, and *John Davenport* her Son, and *Mitchel Lodge*, and *Chaplin*, Executors of *Margaretta Farmer*, — Plaintiffs.

John Oldis, John Blake, Richard Owen, and *Margaret Lee*, — — Defendants.

Case 272.

A. devises lands to his wife for life, and after her decease to his son and daughter, *John* and *Margaret*, to be equally divided between them, and the several and respective issues of their bodies, and for want of such issue, to his wife in fee. This will not create a cross remainder, which can only be raised by an implication absolutely necessary, which is not the case here, for the words *several* and *respective*, effectually disjoin the title.

JOHN Owen Esq; being seised in fee of a messuage and lands in *Shropshire*, mortgaged the premisses to *Griffith Thomas* for 120*l.* and being also seised in fee of a messuage in the possession of *Margaret Humphrys*, did by will devise the two messuages, with the lands belonging, to his wife *Margaret Owen* for her life, *and after her decease, to his son and daughter* John *and* Margaret Owen, *to be equally divided between them, and the several and respective heirs of their bodies, and for want of such issue, to* Margaret Owen *his wife in fee*, and made her sole executrix: she proved the will, entred on the said messuages, and received the rents till her death in *December* 1726, having survived her son *John Owen*, who died an infant unmarried.

The

The widow of the teſtator, after his death, married with *John Farmer* the plaintiff *Eleanor*'s father, and having ſurvived him, made her will, reciting her firſt huſband's will, and deviſed one moiety of the ſaid two meſſuages to *Mitchell Lodge, and Chaplin*, in truſt for the ſeparate uſe of the plaintiff *Eleanor* her daughter, during her life, and after her deceaſe, to *John Davenport* the ſon of *Eleanor* for life, and after his deceaſe, to the defendant *Richard Owen* in fee.

The defendant *Margaret*, the daughter of the teſtator *John Owen*, married one *Lee*, (who is ſince dead), and the defendant *Oldis* having paid off *Thomas*'s mortgage, took an aſſignment thereof; and being willing to purchaſe the *Shropſhire* eſtate of *Lee*, and the defendant *Margaret* his wife, they by indentures of leaſe and releaſe in 1732, between them and *Oldis*, in conſideration of the ſum therein mentioned, granted to him the ſaid premiſſes, and ſuffered a recovery, and he inſiſts that he has a right to enjoy the ſame, *as ſtanding in the place of* Margaret Lee, *on whom, upon the death of* John Owen *her brother, the eſtate deſcended by ſurvivorſhip, and that ſhe became intitled thereto by a croſs remainder under the teſtator's will.* [580]

The plaintiffs claim the benefit of their ſeveral deviſes under the will of *Margaretta Farmer*, and have brought their bill, in order that the plaintiff *Eleanor* may, on paying her ſhare of the mortgage, have a conveyance of a moiety of the premiſſes, and that ſhe may be let into the receipt of one moiety of the rent, and that a partition may be made of the ſaid premiſſes, and that ſhe may be quieted in the poſſeſſion of a moiety thereof, in ſeveralty, for the plaintiff's benefit.

Lord Chancellor: I am of opinion, that the will in this caſe is not ſo penned, as to create a croſs remainder, which, as it is never favoured by the law, can only be raiſed by an implication abſolutely neceſſary, and that is not the preſent caſe, for here the words *ſeveral and reſpective*, effectually disjoin the title; *his Lordſhip* for this purpoſe cited the caſe of *Comber* and *Hill*, in the King's Bench. *H. T.* 7 *Geo.* 2 1733 * (1).

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* *John Holden*, being ſeiſed of ſeveral lands in fee, deviſed to his ſon *Richard* for his life with remainder to his iſſue in tail male, and after his death without iſſue, he demiſed the premiſſes among his three grandchildren in this manner, To his grandſon *Richard* and *Elizabeth* his grandaughter as tenants in common, and to the heirs of their reſpective bodies, and for default of ſuch iſſue, the remainder to his grandaughter *Anne Holden* in fee: *Anne* married, and afterwards *Elizabeth* died without iſſue of her body: The queſtion was, Whether *Richard Holden* and *Elizabeth* took an eſtate in common, with croſs remainders to the heirs of their bodies, for then the eſtate could not veſt in *Anne*, but upon failure of iſſue of both their bodies, or whether this was an eſtate in common, with remainders to the heirs of their bodies generally, for in that caſe, one moiety of the eſtate would veſt in *Anne*, who had the remainder in fee, immediately upon the death of either of them without iſſue: the court were of opinion, that no croſs remainders were created by this deviſe, but that by the death of *Elizabeth* her moiety went over to *Anne*.

(1) 2 *Stra.* 969. S. C. *Williams* v. *Browne*, 2 *Stra.* 996. It is obſervable that according to the *old* caſes, *croſs remainders* could only ariſe in a will by *implication* between *two*. See *Gilbert* v. *Witty*, *Cro. Jac.* 655. *Cole* v. *Levingſton*, 1 *Vent.*

Davenport v. Oldis.

The only instance wherein this case differs is, that in the case of *Comber* and *Hill*, all the devisees were grand children, in equal degree to the testator, and in this case the devise over was to the wife, who could not claim as heir at law, but yet the presumption of kindness was as strong in favour of a wife, and then this does not differ from the reason of that case.

Cross remainders have never been adjudged to arise merely upon these words, *In default of such issue* (2).

In the case of *Holmes* and *Meynell*, *T. Raym.* 425. a great stress was laid upon the word *they*, in case *they* happened to die, then he devised all the premisses, nor can there be any case cited, where cross remainders have been adjudged to arise merely upon these words, *in default of such issue*, and therefore *his Lordship* declared, that the plaintiffs *Eleanor Davenport*, *John Davenport*, and the defendant *Richard Owen*, are intitled to the equity of redemption of a moiety of the premisses, on payment of a moiety of the principal and interest on the said mortgage, and that in case either of the plaintiffs, or the defendant *Richard Owen*, should redeem the said premisses, then he decreed that a commission should issue, to divide the premisses into moieties, one moiety to go to the plaintiffs *Eleanor* and *John Davenport*, and the defendant *Owen*, according [581] to their interest therein, and the other moiety to the defendant *Oldis*, and, after such partition made, he directed proper conveyances to be executed by the several parties (3).

1 *Vent.* 224. *Holmes* v. *Meynel*, *T. Ray.* 452. But more *modern* determinations extend such implication to a greater number. *Pery* v. *White*, *Cowp.* 777. *Phipard* v. *Mansfield*, *Cowp.* 797. *Atherton* v. *Pye*, 4 *Durn. & East*, 710. *Har. Co. Litt.* 195. *b.* n. 1. Tho' cross remainders can never be created by implication in a *deed* (See *Cole* v. *Levingston*, 1 *Vent.* 224.) yet they may arise upon the construction of *marriage articles*. *Marryat* v. *Townley*, 1 *Vez.* 105. *Twisden* v. *Lock*, *Amb.* 663.

(2) *Sed contra Wright* v. *Holford*, *Cowp* 31. *Amb.* 468. S. C. *Phipard* v. *Mansfield*, *Cowp.* 797, 800.

(3) *Reg. Lib. A.* 1737. fol. 783.

March the 12th, 1738.

Case 273.

Hopkins alias *Dare* v. *Hopkins*.

S. C. Ca. temp. Talb. 44. S. C. 1 Vern. 268.

J. H devised his real estate to trustees and their heirs, to the use of them and their heirs, *upon several trusts thereinafter mentioned*: These words are declaratory of his intention, that the legal estate so given, should be used to support all these trusts and limitations after declared; part of which were to the after-born sons of *J. H.* and the court made such a construction as supported the intention, being of opinion it was not inconsistent with the rules of law and equity.

HEARD upon the 3d of *March*, and stood for judgment this day.

John Hopkins the testator, having a large real and personal estate, makes a disposition of both by his will, and as to the bulk of his real estate, devises the same to trustees and their heirs, to the use of them and their heirs, upon several trusts, *viz.* for *Samuel*, the only son of his cousin *John Hopkins* for life, and after his decease in trust for the first and every other son of the body of the said *Samuel*, to be begotten successively, and the heirs males of the body of every such son respectively, and for want of such issue, *in case his cousin* John Hopkins *should have any other son or sons*, then for all and every such other son or sons respectively for their respective lives, with like remainders to

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their several sons successively and their issue male, and for default of such issue, to the first and every other son of the body of *Sarah*, eldest daughter of his said cousin *John Hopkins* for life successively, with like remainders to their issue male, and for want of such issue, the like remainders to the first and every other son of *Mary*, second daughter of his said cousin *John Hopkins*, and their issue male, and so carries on the limitation in like manner, in respect of the other daughters of his said cousin, then in being, and for want of such issue, in case his cousin *John Hopkins* should have any other daughter or daughters, then in trust for their first and every other son in like manner, and for default of such issue, in trust for the first and other sons of his cousin *Hannah Dare*, with like remainders to her first and every other son and their issue male, with remainders over to other relations, remainder to his own right heirs. Hopkins v. Hopkins.

Then comes a *proviso*, that none of the persons to whom the estate was thereby limited, should be in actual possession of the whole, or any part thereof, till he or they respectively attained his or their age or ages of 21, and in the mean time, the trustees to make a handsome allowance for the education of such persons, and the overplus to go to such as should be intitled thereto (1).

These are the several limitations and provisoes, materially relating to the real estate.

Then he devises all the rest and residue of his personal estate, in case there should be any, after payment of debts, &c. to his executors in trust, to be, with all convenient speed, laid out in the purchase of lands, and to be settled to and upon the same trusts and purposes in his will declared of the real estate he was [582] then seised of, and made the trustees his executors.

Samuel Hopkins the first devisee died before the testator, which, after the testator's death, occasioned the bringing two bills, one by *John Hopkins* and his daughter, to have an account, and an execution of the trust, and *John Hopkins* prayed, that, as heir at law, he might have the profits till some persons come in *esse*, capable to take under the will, *as part of the trust undisposed of*; the other was brought by the trustees, that till a person was in *esse*, capable of taking, the profits might be accumulated to increase the estate.

These causes were heard before the Master of the Rolls in 1733, and it was admitted on all hands, that if *Samuel* had survived the testator, he would have taken (at least) an estate for life, in the trust in possession, and all the subsequent limitations between him and the present plaintiff, would in such case have been contingent remainders.

But it was insisted for the plaintiffs in the original cause, that, by the death of *Samuel* in the testator's life, that devise was void, and was to be considered as if it had never been inserted, and that if the subsequent limitations could not take effect as contin-

(1) This proviso is more fully stated in *Ca. temp. Talb.* 44.

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HOPKINS *v.* HOPKINS. gent remainders, they might by way of executory devise, and that they should operate as they could, *ut res magis valeat quam pereat.*

For the present plaintiff it was insisted, that by the death of *Samuel*, the estate of freehold devised to him, became void, and so consequently the contingent remainders, and that the law cannot admit a limitation in its original creation, a contingent remainder, to be by an accident changed into an executory devise.

The Master of the Rolls was of opinion, "That the limitation "to *Samuel Hopkins* was to be considered as if it had never been "in the will, and therefore that the devise to after-born sons "being by future words, in case his cousin *John Hopkins* should "have any other son, it was now to be considered as the first de- "vise, and might take effect as an executory devise."

Lord Chancellor *Talbot* was of the same opinion on the appeal, (*Vide Cas. in Eq.* in his time, 44.) "and decreed, the "trustees to deliver possession to the plaintiff *John Hopkins*, "(of particular estates) and of the estate purchased by the "testator, after the making the will, and to deliver the deeds "and writings to him, and declared he was intitled to the rents "and profits devised to the trustees, accrued since the testa- "tor's death (1), till some person should be in being intitled to an "*estate for life in possession* (which makes no difference in the "decree) according to the limitation in the will, and was in- "titled to the surplus produce of the testator's estate, after "payment of the annual sum charged thereon, and directed "an account of both the real and personal estate, and a like "direction as to the personal estate for investing it in lands: "there was no direction given concerning, a conveyance of "the estate, but a general reservation, and liberty to apply to [583] "the court, as there should be occasion."

This was the decree then made, and upon great consideration, and as to the point on which it was established, it is not disputed in this case, because the plaintiff here founds himself by the present bill, expresly on the foot of that decree.

Since that decree, two new events have happened, which have given rise to this suit.

John Hopkins, on the 18th of *June* 1736, had another son born, named *William*, who died the 24th of *Dec.* 1737, and on his death, the plaintiff, the eldest son of *Hannah Dare*, having attained twenty one, brought this bill to have a settlement made by the trustees, and first prays an estate may be limited to him in possession, and also an account of the profits during *William's* life, and that the surplus profits may be paid to him.

Mr. *Chute* for the plaintiff.

This is a contingent remainder, and not an executory devise, for the estate for life in the first taker, is a vested interest, and

(1) *Ante* 424, n. 1.

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consequently the contingent remainder vests at the same time. *Pays's case, Cro. Eliz.* 848. Hopkins v. Hopkins.

The testator has laboured to give to an un-born person, what he apprehends was never given to any un-born person before, for he has restrained the vesting of the freehold, and suspended it further than any court whatever has attempted to do.

What we contend for is, that admitting this was an executory devise in the second son of *John Hopkins*, yet after he was born, whatever was executory, was then executed, and the freehold estate for life vested in him, with remainders to his first and every other son, and as he has died without issue male, the contingent remainder takes place in the plaintiff. *Lisle* v. *Gray* (1).

No difference between the limitation which did come in *esse* by the birth of *William*, and the limitation which would have come in *esse* immediately, if *Samuel*, the first son of the nephew *John Hopkins*, had survived the testator but an hour.

The proviso in the will, is an abridgment of the power which is given to the first taker, of holding an estate for life, and is for that reason void, as much as if a person should appoint one executor, and then restrain him from administering. *Taylor* v. *Brydal*, 2 *Mod.* 289.

The question will be, Whether, notwithstanding *William* the son was born, the whole rents and profits of the testator's estate shall still accumulate, till the infant would have attained his age of 21, or whether by the birth of *William* the freehold absolutely vested in him.

If a man in a will attempts to give such an estate as the law does not admit, and endeavours to raise such a contingency as it will not allow, they must take their fate according to the rules of law. *Reeves* v. *Long*, 3 *Lev.* 408. *Salk.* 227. the case which introduced the statute of King *William*, as to unborn children. [584]

Executory devises had their original here, but the reason of it was so strong, that the courts of law soon conformed to those rules.

No body is intitled to take the profits under Lord Chancellor *Talbot*'s addition to Sir *Joseph Jekyll*'s decree, but *John Hopkins*, and the court is silent as to every other person.

What is the *terminus a quo* under the last decree? Why, until a person is born, who is intitled to take an estate for life in possession, for otherwise my Lord *Talbot* would have added, until such person arrive at the age of 21 years.

It would be repugnant to say, that *John Hopkins* took an estate for 21 years, at the very time that his estate as *heir at law* ceased upon the birth of his son.

William was not in *esse* at the time of the executory devise, and therefore to say it is still executory, is carrying this doctrine further than was ever yet attempted, for it will wait longer than

(1) *T. Raym.* 278. S. C.

 the compaſs of one life, for here is the life of *William* who is dead, and the life of a perſon who is unborn.

Mr. *Noel* of the ſame ſide.

The only queſtion, Whether the contingent remainder takes effect in poſſeſſion in the plaintiff, upon the death of the ſecond ſon of *John Hopkins?* Or whether it is ſtill to wait, till the birth of another ſon of *John Hopkins*.

As an executory deviſe was introduced to ſupport and aſſiſt the rules of law, this court will not conſtrue an executory deviſe in ſuch a manner as to overturn the rules of law.

Lord Chancellor: Pays's caſe is likewiſe reported in *Noy* 43. and differently ſtated from what it is in *Cro. Eliz.* 848.

Mr. *Noel:* It was only neceſſity that obliged the court to conſtrue it an executory deviſe, at the time of the decree of Lord Chancellor *Talbot*.

But as here is a ſon of *John Hopkins* born ſince the decree this neceſſity ceaſes, and *eo inſtante* the eſtate for life veſted in poſſeſſion in the ſon, the contingent remainder veſted in the plaintiff.

The teſtator allowed the truſtees to expend ſuch a ſum upon the birth of the firſt perſon, who ſhould take an eſtate for life in poſſeſſion, by way of education, as is ſuitable to the largeneſs of the eſtate he is intitled to at twenty-one, ſhews the intention of the teſtator, that it ſhould veſt in the firſt taker. *Bate*'s caſe, *Salk.* 254.

Lord Chancellor: The word *immediate* was put in at firſt by Lord *Talbot*, in his decree, in his own hand, but ſtruck out afterwards, and ſtands now as has been before mentioned, *viz.* inſtead of *immediate* eſtate for life in poſſeſſion: *only*, eſtate for life in poſſeſſion.

Mr. *Green* of the ſame ſide, cited *Dyer* 3 & 4 *Pollex.* 430. where it is ſaid by a very high authority, that the intention of a
[585] teſtator is to direct the conſtruction of a will; but if that intention, though ever ſo plain, is contrary to law, it is abſolutely void.

The queſtion, if the plaintiff ſhould have a decree, whether he is intitled only to an eſtate for life, or to an eſtate tail by virtue of the limitation to him for life, remainder to the heirs male of his body; he[illegible] for the plaintiff, that theſe are words of limitation, and n[illegible]urchaſe.

Mr. *Murray* of the ſame ſide.

This is carried further than the law will ſuffer executory deviſes to wait, for here it muſt wait till the death of the father *John Hopkins*, and the death of the ſon *John Hopkins*, and the rule is, that it muſt wait only 21 years, or ariſe within the compaſs of one life.

Lord Chancellor *Talbot*, in his reaſons for ſupport of his decree, ſays, if *Samuel Hopkins* had ſurvived the teſtator, he would

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certainly have had an eſtate for life, and there can be no diſtinction made between the limitation in the will to *Samuel*, and the limitation to any other ſon to be born of the teſtator's nephew *John Hopkins*. H·PKINS v. HOPKINS.

That the contingency was to wait till the firſt perſon who ſhould take an eſtate for life arrives at the age of twenty-one, was never conſidered at all in the hearing before Lord *Talbot*, and never could, becauſe the profits are diſpoſed of by the teſtator himſelf.

In all caſes of property, this court inviolably and invariably adheres to the rules of law, becauſe they are poſitive, and all the good end of uſes before the ſtatute, are ſtill preſerved in the conſtruction of truſts ſince the ſtatute, for *æquitas ſequitur legem*.

It is contrary to the policy of the law to ſupport an executory deviſe any longer than till an eſtate for life comes in being, upon which the contingency may veſt: an executory deviſe cannot be extended further, or an eſtate made unalienable any longer than for a life in being, or 21 years after ſuch life. *Stephens* v. *Stephens*, *Caſ. in Eq.* in Lord *Talbot*'s time (1).

In the Duke of *Norfolk*'s caſe, *Select Caſes in Chancery* 1. it was ſaid by Lord Keeper *North*, that the meaſures of limitation, in reſpect to the truſt of a term, and of the legal eſtate of a term, are all one, and this court makes no diſtinction, any more than the courts of law. *Vide Humberſton* v. *Humberſton*, 2 *Vern.* 737.

Mr. *Attorney General e contra*.

Money directed by a deviſe to be laid out in land, and ſettled in a particular manner, is a mere executory truſt, and muſt be carried into execution by this court, and therefore the perſonal eſtate here is diſtinguiſhed from the real, and liable to the truſt.

Mr. *Brown* of the ſame ſide.

It has been inſiſted for the plaintiff, that the limitation to him has taken effect to the excluſion of all others, and it is pretended, that truſts, in the caſes of property, muſt be governed exactly by the ſame rule as legal eſtates.

There are ſeveral inſtances, where this court have deviated from this rule; as a dowreſs is intitled to dower in a legal eſtate, but cannot be endowed of a truſt (2); at law a man cannot convey an eſtate to his wife, but in this court he may do it by way of uſe (3). [586]

(1) *Ca. temp. Talb.* 228. S. C.

(2) See *Godwyn* v. *Winſmore*, *poſt.* 2 a. vol. 526.

(3) *Har. Co. Litt.* 3. a. n. 1. 112.

Hopkins v. Hopkins.

As it was impossible, at common law, for a person to convey an estate, but he must part with the whole estate at the time; to obviate this inconvenience, the invention of uses arose; as for instance, If a man conveyed to *A.* and his heirs, to commence within four years, during the intervening time, the freehold is in abeyance, and is a void remainder; but taking it as a springing use, the estate continues in the feoffor, and is executory till the expiration of the four years (1).

The invention of trusts to preserve contingent estates, was to remedy many inconveniencies, and, among the rest, to guard against the accident of a son's being born after the death of the father.

A general legal estate here is conveyed to the trustees, in trust to preserve and answer the particular purposes of his will, and therefore, in this case, it is a general legal estate, and a general trust.

The testator declares, if Mr. *Hopkins* has another son, they shall be trustees for that son, which must mean that they should be trustees *of the estate* likewise; for when a thing is given, the means by which it may be obtained, are certainly intended to be given at the same time, and it would be harsh to say, in a court of equity, whose chief jurisdiction arises out of trusts, that Chancery will limit and restrain the power of trustees, where it is naturally and necessarily implied, though not expressed in terms. *Vide* the case of *Reeves* v. *Long*, 3 *Lev.* 408.

The rule of executory devises has been extended in *Stephens* v *Stephens* so far, as till a child shall come to the age of 21, and for this reason, because no person, until that age, is intitled to convey.

In the case upon Serjeant *Maynard*'s will, the court directed trustees to preserve and support contingent remainders, though omitted in the will itself.

Chapman v. *Blesset*, before Lord *Talbot*, after *Hopkins* and *Hopkins*, *Cases in Equity* in his time, 145.

It is justice, *his Lordship* said, in a court of equity, to apply the legal estate, so as to support the trust estate, and *your Lordship* will, I do not doubt, preserve these trusts in the same manner.

Mr. *Fazakerley* of the same side.

The arguments which the counsel of the other side draw to trusts, from the rules of law, I allow is very right, where they are exactly the same in all circumstances; but where they are not similar, it is otherwise; for if the reason ceases, it would be absurd to construe them by the same rules. *Vide* the Rector of *Cheddington*'s case, 1 *Co.* 148. *b.*

An estate at law may be in abeyance, but a trust is not so one moment in equity; for if there was a chasm of ever so small a duration, it would revert to the heir at law: In *Salter*'s

(1) See the *Essay on Uses and Trusts*, 175. *et seq.* 283. *et seq.*

case, *Yelverton*, *fol.* 9 & 10. a case put there by Lord Chief Justice *Popham*, and agreed to by all the Judges, and a much stronger one than the present. Hopkins v. Hopkins.

It is not necessary that there should be a trust at all to preserve a contingent remainder.

Many instances where this court have spelt out the intent of a testator, though it is not expressed in words, for by implication this court have done what the testator intended.

Are they, in this case, appointed trustees for any particular purpose, exclusive of another? If they are not, then are they trustees in general for all the uses of the will, and, among the rest, are to be considered as trustees to preserve contingent remainders.

The construction we contend for, will support the whole intention, but what the plaintiff aims at, will defeat it in the greatest part of the will, therefore we hope *your Lordship* will construe them trustees for the purpose we insist upon, the preserving the contingent remainders; the case of *Massenburgh* v. *Ash* is not exactly stated in 2 *Vent.* but in the *octavo edition of Chancery Cases* it is (1).

As *to the personal estate*, wherever there is an executory trust, this court will mould it in such a manner, as may best answer the intention of the testator, and therefore I shall not trouble *your Lordship* with cases to this point, when they are trustees for the several purposes in the will, it is absurd to say, that they are not trustees to preserve the contingent remainders, which is one of the principal purposes of the will, and the testator has given the estate to trustees during the life of *John*, and during the life of *Anne* the mother.

Mr. *Chute* by way of reply.

It has been insisted by the gentlemen of the other side, that the case of *Samuel* and *William* are the same; and that the contingent remainders ought still to be preserved.

I never heard, nor ever met with it, that when a tenant for life is born, with remainder to his first and every other son in tail, that trustees ever interposed any further, *than between such tenant for life, and his issue in tail*, and contingent remainders beyond this, would be too remote to be at all considered in the eye of the law; such a distant remainder is not so much as assets in this court.

Lord Chancellor: This could not be an executory devise, because there was an estate of freehold before it, and therefore it is a contingent remainder.

Mr. *Chute:* There is no difference between the present case and *Humberston* v. *Humberston*, but only there several estates for life were limited to persons not in *esse*, and *here* estates *tail* are limited to future persons unborn.

In this case, whilst *John Hopkins* is without a son, he enters at the door of his testator, and has quiet possession, as soon as a

(1) 2 *Cha. Rep.* 275. S. C. 1 *Vern.* 234. 257. 304. S. C.

Hopkins v. Hopkins.

ſon is born, he is turned out again, and if the ſon dies, he enters at the door again.

It has been inſiſted upon, that this is an abſolute eſtate of freehold in the truſtees; I am at a loſs then to conceive how they can ſubdivide this abſolute eſtate into ſo many particular freeholds, as they muſt do, if they would preſerve the contingent remainders, for I ſubmit to *your Lordſhip*, that upon the birth of *William*, an eſtate for life actually veſted in him, and was not to wait till he arrived at the age of 21, and that at the ſame time the ſubſequent limitations of courſe ceaſed to be executory, and are become veſted remainders, to take place upon the death of *William* without iſſue, and in this reſpect equity too will follow the law; for as uſes, before the ſtatute of uſes, were the ſame as *truſts*, ſo, ſince the ſtatute of uſes, *truſts* are conſidered in the nature of uſes before the ſtatute. *Vide Chudleigh*'s caſe, 1 *Co.* 113. *a.*

Lord Chancellor: For the plaintiff it is argued, that the eſtate veſted in *William* on his birth, and was no longer executory, and conſequently all the ſubſequent limitations became remainders, either contingent, or veſted, according to their reſpective natures, and that thoſe that were contingent, not veſting, either during, or *eo inſtante*, that the particular eſtate of *William* determined, are now void, and conſequently the plaintiff, as having the firſt remainder veſted in him, is intitled to the eſtate in poſſeſſion.

For the defendant this was endeavoured to be anſwered three ways;

Firſt, That there is no neceſſity to conſider the limitations ſubſequent to that, to the ſecond ſon of *John Hopkins*, as contingent remainders, but that they may ſubſiſt as ſo many diſtinct executory deviſes, and if one did not take effect, another might.

Secondly, (And which is moſt relied on) that admitting, that by the eſtates veſting in *William*, the ſubſequent limitations were to be looked upon as remainders, yet ſuch as were contingent, were not deſtroyed by their not veſting during his life, but that the legal eſtate in the truſtees is ſufficient to ſupport them.

Thirdly, That a determinable freehold in the equitable eſtate deſcended on the heir at law, and that is ſufficient to ſupport the contingent remainders of the truſt eſtate.

Theſe points have been well argued at the bar, and there are, I think, ſome things clear.

Firſt, That if thoſe had been contingent remainders of a legal eſtate, or a uſe executed, and no truſtees inſerted to preſerve contingent remainders, they would have been void.

Secondly, It is clear, that theſe ſubſequent limitations cannot be ſupported as ſo many diſtinct executory deviſes.

In the caſe of *Higgins* v. *Derby* in *Salk.* (1), before Lord *Cowper*, *Mich.* 6 *Ann.* the utmoſt that was ſaid was, that on the

(1) 1 *Salk.* 156.

limitation

limitation of the truft of a term to the firft fon, and the heirs males of his body, which never took effect, there never having been a fon, that the limitation over to daughters might poffibly be good. Hopkins v. Hopkins.

But in this cafe the truft eftate vefted in *William*, and at leaft for life, (for it muft be admitted, that the provifo did not fufpend the vefting), which being a freehold, was capable of fupporting remainders, and confequently according to the doctrine in the cafe of *Purefoy* v. *Rogers*, 2 *Saund.* 380. (1), and all the authorities, ought to be confidered as remainders (2), and in truth, the fubfequent remainders are to be confidered as fo many parts of the fame executory devife, and when that became vefted in the firft taker, they remain no longer executory. [589]

The cafe is therefore reduced to this queftion, Whether the legal eftate in the truftees, will fupport thefe remainders.

Before I proceed to the difcuffion of it, I will obferve that it is not neceffary, in order to bar the plaintiff from having a conveyance (3), that all the intermediate contingent limitations fhould be *good* fubfifting contingent remainders, but it is fufficient, if fome of them are *good* by way of contingent remainder, and ftill fubfifting, for then, fo long as they continue, the plaintiff comes too early.

And I am of opinion, that the legal eftate in the truftees will fupport (at leaft) fome of thefe contingent remainders (4), for it is not to be contended that all of them are good, and this on two grounds.

Firft, Upon the plain intention of the teftator.

Secondly, That this intention is confiftent with the rules of law, and the common principles of equity.

Firft, As to the intention, the prefent plaintiff certainly comes before the court in a very unfavourable light, for he claims under the will, and the teftator's bounty, and at the fame time endeavours to defeat the greateft part of it; indeed this was retorted on the defendant *the heir at law*, but that is very differ-

(1) The following part of this paragraph fhould run thus, — "and other "authorities, the fubfequent limitations "ought to be confidered as remainders; "and in truth, although the firft eftate "in *William*, who was not born at the "teftator's deceafe, be conftrued an "executory devife, yet are not the fub"fequent limitations to be taken as fe"parate and diftinct executory devifes, "but as parts of the fame devife." *Per Lord Loughborough*, in *Habergham* v. *Vincent*, 4 *Bro. Cha. Rep.* 390, from a corrected copy of this cafe.

(2) *Reeve* v. *Long*, *Carth.* 310. 4 *Mod.* 282. S. C. *Nealthy* v. *Bofcille*, *Rep. temp. Hard.* 258. *Walter* v. *Drew*, *Com.* 372, and 2 *Vef.* 616. *Doe* v. *Morgan*, 3 *Durn. & Eaft.* 763, 765.

(3) The following part of this paragraph fhould ftand thus, — "that all "the intermediate limitations between "the eftate vefted in *William*, and that "limited to him, fhould be good fub"fifting contingent remainders, but it "is fufficient if fome of them are good." *Per Lord Loughborough*, *ubi fupra*.

(4) *Chapman* v. *Bliffet*, *Ca. temp. Talb.* 145, and *poft.* 594. *Robinfon* v. *Robinfon*, 2 *Vef.* 230. In *Bamfield* v. *Popham*, 1 *P. W.* 56. 1 *Vef.* 26. Lord *Trevor* faid, that it was refolved, that a *ceftuique truft* for life could not deftroy the contingent remainders to his firft and other fons.

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ent, for he does not claim by the will, or the teſtator's intention, but paramount to that, and only aſks that which is not given from him.

The teſtator could not frame a will, that no one ſhould take his eſtate; if he could, it is likely he would have done it.

To conſider therefore, and apply this intention to this point, *Firſt*, he deviſes his real eſtate, to truſtees, and their heirs, to the uſe of them and their heirs (ſo that it is a clear uſe executed by the ſtatute), *upon ſeveral truſts herein after mentioned:* Theſe words were properly and ſtrongly relied on for the defendant, as declaring his intention, that the legal eſtate ſo given ſhould be uſed to ſerve and ſupport all the truſts and limitations after declared: Then he proceeds to limit the truſt, and when he comes to the after-born ſons of *John Hopkins*, he ſays, *In caſe* John Hopkins *ſhould have any other ſon*, then in truſt for all and every ſuch other ſon for life, with like remainders to their iſſue male, *&c.* ſo that he expreſsly declares, that they ſhould be truſtees for thoſe after-born ſons, and conſequently the court is to make a conſtruction to ſupport it in ſuch manner as they can: But though this was the plain intention, yet, if it is inconſiſtent with the rules of law and equity, it is to be rejected.

Tho' contingent remainders by law, muſt veſt during, or at the inſtant the particular eſtate determines, yet it does not hold in the caſe of truſts. The ground the law goes upon is, that a freehold cannot be in abeyance, becauſe there muſt be a tenant of the freehold to perform ſervices, and anſwer all writs concerning the realty, but this objection is obviated in the caſe of an equitable eſtate, becauſe the truſtee is the tenant of the freehold to perform ſervices, *&c.*

*Therefore, as to the ſecond queſtion, the great objection is, that, by law, contingent remainders muſt veſt during, or at the inſtant the particular eſtate determines; and the only method found out to avoid this ſince *Chudley*'s caſe, 1 *Co.* has been to create a particular eſtate of freehold, and veſt it in truſtees to preſerve the contingent remainder; and there is no ſuch limitation in this caſe, and it is ſaid to be a maxim in this court, that truſt eſtates (creatures of equity) are governable by the ſame rules of property as legal eſtates, in order to preſerve one uniform rule and meaſure of property.

[*590] And further, that the owner of a truſt has the ſame power over it as he would have was it a legal eſtate in the ſame intereſt or extent: this is undoubtedly true in general, but affords no juſt concluſion in the preſent caſe.

Firſt, Becauſe the ground and foundation the common law goes upon, in making contingent remainders void in ſuch caſes, does not hold in the caſe of truſts.

(1) *Secondly*, Becauſe to allow them to be good, will not affect any rightful power of alienation in the *ceſtuique truſt*, which the law allows to owners of legal eſtates, and conſequently do not tend to a perpetuity.

(1) This paragraph ſhould be as follows, — "*Secondly*, Becauſe to allow "*ſuch of the limitations as are not too remote* to be good will not affect any "rightful power of alienation in the "*ceſtuique truſt*, which the law allows to "owners of legal eſtates, and conſequently, do not tend to a perpetuity." *Per Lord Loughborough*, *ſupra*.

Thirdly,

Thirdly, Because to require a new distinct limitation of legal estate, to support the contingent remainders in such a case of a trust, would be quite nugatory.

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As to the *first*, the ground on which the common law requires the vesting of the contingent remainders either during, or *eo instante*, the particular estate determines, is, that a freehold cannot be in abeyance; that there must be a tenant of the freehold to perform services, to answer to a *præcipe*, and all writs to be brought concerning the realty, or otherwise there would be a failure of publick service and publick justice.

But this holds not in the case of an equitable estate, *the trustee* is tenant of the freehold to perform services, *&c.* but it has been objected there is equal mischief, if he is not liable to answer demands, and to be bound by decrees in this court.

That will not follow, for if there are ever so many contingent limitations of a trust, it is an established rule, that it is sufficient to bring the trustees before the court, together with him in whom the first remainder of the inheritance is vested, and all that may come after will be bound by the decree, though not *in esse*, unless there be fraud and collusion between the trustees and the first person in whom a remainder of inheritance is vested; but that is of no weight, for fraud and collusion will unravel a thing as well at law as equity.

Where there are ever so many contingent limitations of a trust, it is sufficient to bring the trustees before the court, together with him, in whom the first remainder of the inheritance is vested.

There is a great opinion, that this maxim of the common law that there must be a freehold, could not be drawn over to uses before the stat. of *Hen.* 8. *Chudleigh's* case, 1 *Rep.* 13?. *per Gawdy*, "That if a man, *before the statute*, had made a feoffment "to the use of one for years, and after to the use of the right "heirs of *J. S.* this limitation had been good, for the feoffees re-"main tenants of the freehold; but such limitation after the sta- [591] "tute is void, for then the freehold would be in abeyance, for "nothing can remain in the feoffees."

As to the second reason, if it tended to a perpetuity, it would be a great objection. Before the statute of *Hen.* 8. the judges of the common law gave uses very hard names, and called them the product of fraud, *&c.* to remedy those mischiefs the statute was made, to execute and bring the estate to the use, that after the statute the *cestuique use* was seised of the estate at law, as before he was of the use in equity; and this the judges professed to adhere to, but notwithstanding that, the necessities of mankind, and reasonable occasions in families, obliged them in a little while to give way to uses.

The statute of uses was made to execute, and bring the estate to the use; and after the statute, the *cestuique use* was seised of the use at law, as before he was of the use in equity; but the necessities of mankind have obliged judges to give way to uses notwithstanding.

Contingent uses, springing uses, executory devises, powers over uses, were also foreign to the notions of the common law, and could not be limited on common law fees, but were let in by construction, by the judges themselves, upon uses, after they became legal estates; yet the judges still adhered to the doctrine, that

Contingent uses, springing &c. executory devises, &c. were foreign to the notions of the common law but were let in by construction (by judges themselves) upon uses, after they became legal estates.

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that there could be no such thing as *an use upon an use*, but where the first use was declared, there it was executed, and must rest for that estate: therefore, on a limitation to *A.* and his heirs, to the use of *B.* and his heirs, in trust for *D.* *B.*'s estate was held there to be executed by the statute, and *D.* took nothing (1).

Of this construction equity took hold, and said that the intention was to be supported. It is plain *B.* was not intended to take, his conscience was affected. To this the reason of mankind assented, and it has stood on this foot ever since, and by this means a statute made upon great consideration, introduced in a solemn and pompous manner, by this strict construction, has had no other effect than to add at most, three words to a conveyance (2).

Courts of equity have given the same power to *cestuique trusts* as to alienation, as if it was an use executed.

It is very true this would not have been endured, if courts of equity had not in general allowed these trust estates to have the same consideration in point of policy with legal estates, and given the same power to *cestuique trusts*, with respect to alienations, as if it was an use executed. Therefore a tenant in tail of a trust may bar his issue by a fine; a tenant in tail of a trust, remainder over, may dock the remainder by a common recovery (3); nay, some go so far as to say (4), he may do it by feoffment only (5).

Upon a trust in equity, no estate can be gained by wrong, as there might of a legal estate, therefore on a trust in equity no estate can be gained by disseisin, abatement, or intrusion.

But all these are common assurances, and rightful methods of conveying estates, for it was never allowed that in trust estates, a like estate may be gained by wrong as there might be of a legal estate; therefore, on a trust in equity, no estate can be gained by disseisin, abatement, or intrusion. It is true, it may happen so upon a trustee, and in consequence the *cestuique trust* may be affected, but that is on account of binding the legal estate; but on a bare trust, no estate can be gained by disseisin, abatement, or intrusion, whilst the trust continues.

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(6) The destruction of contingent remainders, by tenant for life, is considered as a wrong without remedy, and so strongly a tort, that it is a forfeiture of his own estate, and therefore works a destruction of the remainder. Now if equity never suffers any other wrongful act, or any thing similar, to gain or defeat the trust estate, whilst the trustee is in possession, why should this

(1) *Dyer* 155. a. *B N. C.* 284. 1 *Co.* 136. b. 137. 4. 2 *P. W.* 146, 147. *Bagshaw* v. *Spencer*, *post*. 2 vol. 578.

(2) See the *Essay on Uses and Trusts*, 231, 232, 233.

(3) *North* v. *Champernoon*, 2 *Cha. Ca.* 78. *Carpenter* v. *Carpenter*, 1 *Vern.* 440.

(4) What follows should be thus,—"a bargain and sale alone, by a tenant "in tail in equity, shall have the same "effect as a fine." *Vide per Lord Loughborough, ubi supra.* So 1 *Vern* 440. *Beverley* v. *Beverley*, 2 *Vern.* 133. *Contra Legatt* v. *Sewell*, 2 *Vern.* 552.

(5) *Banaster* v. *Elly*, 2 *Vern.* 344.

(6) From the corrected copy of Lord *Loughborough* noticed *supra*, it appears, that the two following paragraphs should be read thus,—"Nor have courts of "equity ever supported *the destruction of* "*contingent remainders by tenant for life*, "but have endeavoured to support them, "where there hath been no remedy at "law, and so in cases of mergers, they "have revived terms for raising younger "childrens' portions, where the terms "were merged at law for the sake of cre-"ditors, and other equitable purposes, as "in *Powel* v. *Morgan*, 2 *Vern.* 90."

take

take place, or the court strive to preserve a power to *cestuique trust* for life, the execution whereof the law calls a wrong?

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It is in this respect to be compared to the cases of *merger*, for though it is the doctrine of this court, that the rules of property and convenience hold in the same manner with respect to trusts as to legal estates, to prevent perpetuities; yet in the cases of *merger* there are many instances where there would be *mergers* of legal estates, and yet courts of equity have never suffered *mergers* of trusts, where the legal estate continued in the trustees, but have been against the *merger* if the justice of the case required it.

There are many instances where there would be *mergers* of legal estates, and yet courts of equity have never suffered *mergers* of trusts.

Thirdly, Where the whole fee is in the trustees, to require a new distinct limitation to support contingent remainders, would be wholly vain and nugatory.

Suppose, after the limitation to *Samuel* and his issue, the testator had limited over a remainder to *J. N.* to preserve contingent remainders, could *J. N.* have taken at law? No, for it would have been *a use on a use*; nor would he have taken in equity, for the first trustees having the whole estate, are *trustees* for all the *cestui que trusts*.

Suppose such limitation had been to the first trustees, they could have taken nothing more; so that such a new limitation could have no operation.

The principal objection is, "That the legal estate in the "trustees, and the equitable in the *cestui que trusts*, are of different "uses, and cannot draw over the one to support the contingent "remainders of the other, and that a man might as well make "use of an estate executed by the statute of uses, to support "a contingent remainder of a particular estate in a use." (1).

I admit they are of different natures, but still the legal estate remains in the trustees to serve and support all the trusts; but it is quite otherwise on the statute of uses*. The words of the statute are, "That every person that shall have any such use, &c. "shall from henceforth stand, and be seised, &c. of such lands, "&c. to all intents, constructions, and purposes in the law, of "and in such like estates, as they had or shall have in use, "trust or confidence of or in the same." By which the legal estate is executed to the uses, and the *cestui que trust* has the legal estate, just in the same manner as the use before; the consequence whereof is (2), that as to persons *in esse*, the legal estate became vested immediately as they came *in esse*, provided they come so in due time, according to the rules of common law;

Uses executed, and mere trusts, stand on different foundations, and will not be governed by the same.

* 27 *Hen.* 8. c. 10.

(1) The above paragraph should be read thus, "The principal objection "is, that the legal estate in the trustees, "and the equitable in the *cestui que* "*trusts* are of different *natures*, and the "*one* cannot support the *other*." *Corrected copy noticed supra.*

(2) Read the following part of this paragraph thus, "That the legal estate *either* became vested immediately, or if not, then the estate went over immediately to the next remainder it would in the case of a common law fee. So it is construed in *Chudleigh's* case, and if it *once goes over, it can never come back again.* *Corrected copy supra.*

if

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if not, then the estate went over immediately to the next remainder-man, as it would in the case of a common law fee; So it is construed in *Chudleigh's* case, and if it went over by deed or will, so as the party took as a purchaser, it is never drawn back again.

[593] This shews that, as to this question, there can be no reasoning at all from the cases of uses executed to mere trusts, but they stand on different foundations. These are the reasons which govern my judgment on this point, and I own I can see no inconvenience from it.

It must be admitted that the testator might have done this, as to part of the remainders (those that are capable of being supported), if he had used proper words; and if he has clearly expressed his intention, this court (which is to direct a settlement according to his intention, as far as it may stand with the rules of law) will take the proper method to effectuate this intention.

Where a trust is in its nature executory, it is incumbent on the court to follow the intention of the parties, as far as the rules of law will admit.

Next as to the cases, the Earl of *Stamford* v. Sir *John Hobart*, in 1709, (notwithstanding the distinction taken upon it) is a strong authority for this purpose. Serjeant *Maynard* "devised "his estate to trustees and their heirs, and declared after his "wife's death, they should convey the estate to the use of, "and in trust for, Sir *H. H.* for life, remainder to the first "son for 99 years, if he so long live, remainder to the heirs "male of such first son, remainder to the Countess of *Stamford* for life, remainder, *&c.* a conveyance was directed ac"cording to the will, *exceptions were taken to the draught of the* "*conveyance*; Lord *Cowper* declared, that where articles or a "will were improper or informal, the court was not to direct "a conveyance according to such improper directions, but in "a proper and legal manner, which might best answer the in"tention of the parties, and conceived the intention to be, "that the estate should be secured so far as the rules of law "would admit (1), before cross remainders should take place, "and therefore ordered accordingly."

Upon an appeal to the House of Lords, alledging, that this was making a different settlement, the order was affirmed upon this principle, *that a trust estate being in its nature executory, it is incumbent on the court to follow the intention of the parties, as far as the rules of law will admit.*

Where the court makes use of the words *strict settlement* in an order, it implies a direction to the Master to have trustees to preserve contingent remainders inserted.

The next is the case of *Humberston* v. *Humberston* (2), 2 *Vern.* 737, and *Cas. in Eq. Abr.* 207. "There the testator had made a

(1) Instead of the words which follow as above read thus. "And therefore in"terposed between the estate for life and "the remainders, an estate to trustees "to support contingent remainders, "tho' there was no such direction in "the will." *Corrected copy cited supra. Vide etiam Baskerville* v. *Baskerville, post.* 2 vol. 279.

(2) S. C. 1 *Cox's P. W.* 332. n. 1.

"whimsical

" whimsical will, devising his estate to the drapers company " and their successors, in trust to convey to the plaintiff for " life, remainder to his first and every other son for their lives, " and to their heirs males for life, remainder to about *fifty* other " persons for their lives, and their sons for their lives. Lord " *Cowper* declared it a vain attempt to make a perpetuity, but " however that there ought to be a *strict settlement*, which im- " plied a direction to the Master to have trustees to preserve " contingent remainders inserted," for that is always understood by the words *strict settlement*.

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It appears by these cases, that however improperly a will is penned, the court will take notice whether the testator intended a strict settlement, and direct accordingly, as far as the rules of law will permit.

However improperly a will is penned, if the testator intended a strict settlement, the court will direct accordingly.

But a distinction was taken between those cases and the present, that they were cases of executory trusts, where the will *itself directed a conveyance; but here is no conveyance directed, but the trust only declared by the will.

I admit the court has thrown out such sort of expressions, but I think there is no difference. All trusts are executory (1), and whether a conveyance be directed by the will or not, this court must decree one, when asked at a proper time; but I do not give any conclusive opinion to oust that distinction.

All trusts are executory, and whether a conveyance be directed or not, the court must decree one, when asked at a proper time.

In this will there is a plain declaration of the testator's intention that this should be an executory trust, and that there should be in due time a strict legal conveyance made by the trustees.

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The first clause from which such an intention may be collected, is the *proviso* relating to the profits before the persons come into actual possession, &c. till he or they attain 21, and in the mean time the executors to make such handsome allowance for the education of such persons, and the overplus to go to such person as shall be intitled thereto.

Here is an intention plainly declared, that the trustees should continue in possession of the estate and receipt of the rents, till one to whom an estate for life is limited should be 21, and the trustees in the mean time are to make a handsome allowance for the education of such persons out of the rents, (whether the direction for laying up the surplus was to be supported or not, is immaterial to this question), and after attaining the age of *twenty-one*, such person to have the possession, (that is) *the estate to be conveyed*.

The next clause is directing 300 *l. per ann.* to *James Hopkins*, one of the trustees, for past services, to encourage him in the care of the trust, &c. to be paid him half-yearly, till some person should come into possession, &c.

This is still fixing the age of 21 to be the time that such person should have the possession, and consequently, by construction, intitled to have a conveyance of the legal estate.

(1) See *Bagshaw* v. *Spencer*, *post*. 2 vol. 583.

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The next clause is *that* where he directs "the residue of his "personal estate to be laid out, *&c.* and conveyed to his trus-"tees upon the same trusts, *&c.*" (*Vide* the clause.)

By which is plainly meant to make as strict a settlement as possible of the lands to be newly purchased, and yet he connects them both together upon the same trusts.

But be this point as it will, the case of *Chapman* v. *Bliffet* (1), decreed by Ld. *Talbot* in 1735, is a clear authority, "that the "legal estate in trustees will support contingent remainders, "even of a trust declared by will *where no conveyance is di-*"*rected.*"

The legal estate in trustees will support contingent remainders of a trust declared by a will, where no conveyance is directed.

The case was, "*J. Bliffet*, after several directions and "charges upon his real estate, devises all other his real estates to "trustees and their heirs, in trust to pay his son *J. B.* quarter-"ly, 37 *l.* 10 *s.* during his life, and if there were any child or "children, he gave the rest and residue of his real estate for the "education and benefit of such child or children, and if his son "married with such consent as the will mentions, 100 *l. per* "*ann.* to his wife; if without, 10 *l. per ann.* and after his "said son's decease, gave one moiety of the said trust estate to "such child or children, their respective heirs, executors, and [595] "assigns, the survivor of them, *&c.* and the other moiety to "the child or children of *Joseph*, *&c.* and if *J. B.* died with-"out issue, to such child, *&c.* of my daughter, *&c.* with a "remainder over; the testator dies. *J. B.* marries and has a "son then died; *Joseph* (who was the testator's grandson) had "no son born at the time of the death of *J. B.* but had a son "four years after, and upon this a bill was brought by the heir "at law, insisting that these limitations were void, particular-"ly to the son of *Joseph*, not being born till four years after the "death of *J. B.*"

The first question was, Whether it was to be considered as a legal estate subsisting in the trustees, or whether it was not a use executed by the statute? Lord *Talbot* (and myself on a re-hearing) were of opinion, "that the legal estate in fee was in "the trustees, and all the limitations, in the subsequent interest, "were trusts."

The next question was, Whether the limitation to the son of *Joseph* was good? and if so, Whether as an executory devise or a contingent remainder? Lord *Talbot* "was of opinion, "that it might be good even as an executory devise, in a legal "limitation, and the only objection was, that the limitation "was *in verba de præsenti*: but he said the words were to be "considered as the testator meant them, that he knew *Joseph* "was an infant and young, and devising a moiety to his child "(knowing he had none) must necessarily intend it future, "and therefore it was impossible to shew an intention more "clearly of children thereafter to be born.—But he went on, "that when *J. B.* had a child born, that had a freehold in the "trust during the life of *J. B.* whether, after that, it was to

(1) *Ca. temp. Talb.* 145. S. C.

"be

"be considered as an executory devise, or a contingent remainder the child of *J. B.* having a kind of freehold in the trust itself? He held, that if taken as a remainder (in case of a limitation of legal estate) it was clearly void, for the freehold would be in abeyance for 4 years, between the death of *the son* of *J. B.* and the birth of the son of *Joseph*; but he said, the reason of that rule failed in the case of trusts, and was of opinion, that the first estate in the trustees preserved the whole trust and therefore, whether it was to be considered as an executory devise, or contingent remainder of a trust, that it was good, and that the plaintiff was intitled to a moiety."

HOPKINS *v.* HOPKINS.

This resolution comes up to the present in all its points.

As to the third point, I shall not lay much stress upon it, and I own I took it to be clearly otherwise, when mentioned at the bar, but on consideration, I think there is more to be said in support thereof than I was at first aware of.

The objection is, that the particular estate, and remainder must be created at one and the same time, as making parts of the same *estate; and this is undoubtedly the general rule; but it is equally a rule at law, that in cases where an estate is limited to the ancestor for life, and afterward to the heirs males of his body, that the estates are connected, and make an estate tail in the ancestor, where it is by the same conveyance; so is *Shelly*'s case, and it has also been held to connect and make one estate tail, where it did not arise by the same conveyance, but by way of resulting use, and so resolved by three judges in the case of *Pybus* and *Mitford*, 1 *Vent*. 373. *A.* covenanted to stand seised of lands, to the use of the heirs males begotten or to be begotten on the body of his second wife, and died at the time of the deed; he had issue by her, a son *R. Hale*, *Wild*, and *Rainsford* held, that, in this case, "The use of the freehold returned or resulted, by operation of law, to the covenantor for life, which being conjoined to the estate limited to the heirs males of his body, made an estate tail, and that this estate for life, arising by operation of law, was as strong as if it had been express."

Where an estate is limited to the ancestor for life, and afterwards to the heirs males of his body, the estates are connected, and make an estate tail in the ancestor, where it is by the same conveyance. The same has been held where it did not arise by the same conveyance, but by way of resulting use; Lord Chancellor inclined to think, that the resulting trust of a freehold, to support contingent remainders of a trust, might connect in the same manner with the limitation in tail, though not created together with it.

Now, if an estate for life, resulting to the covenantor, which was part of the old use, and remaining in him, might unite and connect with the limitation in tail in the conveyance, why may not the resulting trust of the freehold, to support contingent remainders of a trust, do the same, though not created together with it? There doth not seem to me to be any greater objection to the one than the other. [*596]

My Lord Chief Justice *Hale*'s expression in that case, is directly applicable, that this is plainly according to the intention of the parties, and if we can by any means support it, we ought to do it as good expositors.

But however, as I said before, I would not be understood to give any positive opinion; but it deserves to be better considered,

Hopkins v. Hopkins.

dered, by reason of it's analogy to the case of *Pybus* and *Mitford*.

In a limitation to support contingent remainders, it is not material to restrain it to the life of tenant for life of the land, provided it be restrained to the life of a person in being.

Another objection taken for the plaintiff was, that it is impossible to frame such an express limitation, as would support these contingent remainders: If this was true, it would be very material: It is so, as to some, but not to all; for as to the sons of *John Hopkins*, to be born hereafter, the limitations, when the conveyance is to be made, may be supported, so as to the sons of the bodies of such daughters as were living at the testator's death, for I make a great distinction between that limitation, and the limitation to the sons of *after-born daughters*: as to *John Hopkins*'s after-born sons, it may be limited to trustees and their heirs, till he has a son born, and so after his death, till *Sarah* has a son born, and to any other of the daughters that were in *esse* at the testator's death.

But it has been objected further, that this is a new invented limitation to support contingent remainders, and that it was never yet carried further than during the life of tenant for life of the land, or birth of a posthumous son, and that to be sure is the common case of settlements; but there have been other limitations, and it is not (in my opinion) material to restrain it to the life of tenant for life of the land, provided it be restrained to the life of a person in being.

[597] It has been also objected, that all such trustees on such limitations have hitherto been restrained to receive the profits for the benefit of the tenant for life, but this would be to create a new trust for the benefit of the heir at law; but this is no more than the common case of a resulting trust, and it is immaterial, whether it be express or implied; for if it be implied by the will, it must be expressed in the conveyance.

There may be a resulting trust, under a trust to appoint contingent remainders for the heir at law, in the same manner as under an executory devise.

And so it was allowed in the case of *Carrick* v. *Errington*, 2 *Wms. Rep.* 361. "*Edward Errington* had made two settle- "ments of his estate, one by fine in the life-time of his an- "cestor, which (if at all) could only operate by estoppel; "he afterwards made another settlement to trustees, to the "use of himself for life, &c. remainder, &c. and by a con- "veyance executed another day, they (to whom the fee was "limited) executed a declaration of trust for *Thomas Erring-* "*ton* for life, without impeachment of waste, remainder to "trustees to preserve contingent remainders, during the life "of *Thomas Errington*: In the conveyance were unnecessarily "made trustees to preserve contingent remainders, it being a "trust estate; *Edward Errington* died without issue, and the "whole legal estate was admitted to be in the trustees: In "the second deed they were only trustees of the beneficial "interest, and *Thomas*, who was to take the first estate in the "trust, was a papist and disabled by the statute to take any "beneficial interest; and it was insisted that, by the statute, "both the trust and legal estate were void, and therefore the "estate to go over by that conveyance to the next remainder- "man, who should be a protestant, and capable of taking.

"First

HOPKINS v. HOPKINS.

"First question, Whether the deed was obtained by fraud?

"Second question, Whether the legal estate in the trustees "(who were only trustees under the first deed) was void, be- "cause this remainder-man was a papist, and incapable of "taking?

"Lord *King*, and afterwards the House of Lords, held, that "the trust being not only to receive rents, &c. but also to "preserve contingent remainders, and possibly a person capa- "ble of taking might come in *esse*, that *that* was a further "trust, which the statute did not make void; it had indeed "avoided that for life, but as there was another trust upon the "legal estate, which might, by possibility, be capable of be- "ing enjoyed, the estate should remain in the trustees, to sup- "port the contingent remainders; and as to the profits in the "mean time (for the remainder-man could not take them, "nor the trustees, they being only mere instruments) the heir "at law should have them, till some person came in *esse*, "capable of taking under the contingent remainders."

This, therefore, is a very clear authority, that there may be *a resulting trust* (under a trust to support contingent remainders) for the heir at law, in the same manner as under an executory devise: Indeed it was insisted in that case, that the estate should, in the mean time, go over; but the court held otherwise, for then it would have vested by purchase, and could never have come back again.

As to the devise of the personal estate, if I am right in what I have said with regard to the real estate, it will hold stronger as to the personal, that it is a clear executory trust, and falls within the reason of the case of *Papillon* v. *Voice*, which is a strong authority on that head (1).

The consequence of the whole is, that the present plaintiff cannot have such a conveyance as he prays by his bill, nor the surplus of the profits during the life of *William*.

But it remains to be considered, whether he can have any other relief.

I think no conveyance ought yet to be made of this estate, but it must remain in the hands of the trustees to see whether *John Hopkins*, or any of his daughters, will have a son that shall attain the age of 21, for so long there are trusts to be preserved, and no *cestui que trust* till then is to come into possession.

If a conveyance was to be now directed, it would be proper to consider what estate ought to be limited to the plaintiff; but as I think this is not necessary, the bill must be dismissed, but without prejudice as to the plaintiff's applying to the court under the former decree, for a settlement to be made of the trust estate, according to the reservation in that decree (2).

(1) 2 *P. W.* 471. S. C. (2) *Reg. Lib. A.* 1738. fol. 367.

CAP. CIII.

Rent.

(A) *In what Cases there may be a Remedy for Rent, in Equity, when none at Law.*

May the 19th, 1739.

Benson v. *Baldwyn* (1).

Case 274.

A bill may be brought for rent in this court, where the remedy at law is lost or becomes very difficult, and this court will relieve on the foundation of payment for a length of time

LORD *Chancellor*: Where a man is intitled to a rent out of lands, and thro' process of time the remedy at law is lost, or become very difficult, this court has interfered and given relief, upon the foundation only of payment of the rent for a long time, which bills are called bills founded upon the *solet*: Nay, the court has gone so far as to give relief, where the nature of the rent (as there are many kinds at law) has not been known, so as to be set forth, but then all the terre-tenants of the lands, out of which the rent issues, must be brought before the court, in order for the court to make a compleat decree (2).

(1) The original bill was brought to ascertain what lands were charged with certain rents; when it was referred to the Master to enquire what lands were so charged. *Reg. Lib. A.* 1728. fol. 487. An order was made upon the Master's report, and his Lordship now reversed that order, and directed the Master to review his report. *Reg. Lib. A.* 1738. fol. 417.

(2) See *Thorndike* v. *Allington*, 1 *Cha. Ca.* 79. *Collet* v. *Jaques*, 1 *Cha. Ca.* 120. *Davy* v. *Davy*, 1 *Cha. Ca.* 144. *Cox* v *Foley*, 1 *Vern.* 359. *North* v. *Strafford*, 3 *P. W.* 148. *Holder* v. *Chambury*, 3 *P. W.* 256. Duke of *Leeds* v. *Powel*, 1 *Vef.* 171. Duke of *Bridgewater* v. *Edwards*, 4 *Bro. P. C.* 139. *Bouverie* v. *Prentice*, 1 *Bro. Cha. Rep.* 200. Duke of *Leeds* v. *New Radnor*, 2 *Bro. Cha. Rep.* 340, 518.

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[599]

CAP. CIV.

Resulting Trusts.

Vide title *Assets*.

Vide title *Creditor and Debtor*.

Vide title *Trust and Trustees*, &c.

C A P. CV.

Rule of the Court.

Vide title *Money*.

C A P. CVI.

Scrivener.

Ex parte Burchall.

April the 2d, 1752.

Vide title *Bankrupt, under the Division, The Construction of the repealing Clause in the* 10th, *of Queen* Anne.

C A P. CVII.

[600]

Separate Maintenance.

Easter Term, 1737.

Moore v. *Moore*.

Vide title *Baron and Feme, under the Division, Concerning Alimony and separate Maintenance*

C A P. CVIII.

Specifick Legacy.

Dun and Others v. *Coates* and Another.

November the 24th, 1738.

Vide title *Bill, under the Division, Bills of Discovery; and herein of what Things there shall be a Discovery.*

Vide title *Legacy, under the Division, Ademption of it.*

Vide title *Injunction.*

Vide title *Commission of Delegates.*

C A P. CIX.

Spiritual Court.

Michaelmas Term, 1737.

Hill v. *Turner.*

Vide title *Marriage, under the Division, Where it is Clandestine.*

C A P. CX.

[601]

Statute relating to Creditors.

(A) *Rule as to the* 13 *Eliz. cap.* 5.

November the 6th, 1745.

Walker and Others v. *Burrows.*

Vide title *Bankrupt, under the Division, Rule as to Assignees.*

C A P. CXI.

Statute of Frauds and Perjuries.

March the 2d, 1738.

Charlewood v. The Duke of *Bedford.*

Vide title *Landlord and Tenant.*

Vide title *Agreements, Articles, and Covenants.*

C A P. CXII.

Statute of Limitations.

Vide title *Answers, Pleas, and Demurrers.*

CAP. CXIII.

Statute relating to Purchasers.

(A) *Rule as to the 27th of Eliz. cap.* 4.

Walker and others v. *Burrows.* *November* the 6th, 1745.

Vide title *Bankrupt, under the Division, Rule as to Assignees.*

CAP. CXIV.

Steward.

Vide title *Landlord and Tenant.*

CAP. CXV.

Surrender.

Vide title *Copyhold.*

CAP. CXVI.

Tenants in Common.

Vide title *Jointenants in Common.*

C A P. CXVII.

Tenant by the Curtesy.

Hilary Vacation, 1737.

Elizabeth and *Mary Casborne*, — — Plaintiffs.

Elizabeth Scarse, and *Alexander Inglis*, — Defendants

Case 275.
S. C. 2 Eq. Cas. Abr. 728. pl. 6.
S. C. 7 Vin. Abr. 156. pl. 23.

A. seised in fee of a freehold estate, mortgages it, and afterwards intermarries with *B.* *A.* dies and the mortgage is not redeemed during the coverture; this is notwithstanding such a seisin in the wife as intitles the husband to be tenant by the curtesy of the mortgaged premisses, for in this court the land is considered only as a pledge or security for the money, and does not alter the possession of the mortgagor.

* Sir *Joseph Jekyll.*

THE father of the plaintiffs devised to *Anne* his daughter, the plaintiff's eldest sister, all his estate, freehold and copyhold, in fee, charged with 200*l.* a-piece to the plaintiffs. *Anne*, after her father's death, possessed the several estates, and afterwards intermarried with the defendant *Inglis*, and soon after died, leaving issue a son, who died an infant and without issue, upon whose death the plaintiffs, as heirs at law both to the infant and their sister, became intitled to the real estate. *Anne Inglis*, before her marriage, mortgaged part of the freehold premisses to the defendant *Scarse* in fee for 900*l.* The bill is brought against the mortgagee and the husband for an account, and for the direction of the court.

The defendant *Alexander Inglis* insisted, that, having had issue by his wife, he was intitled to an estate for life, as tenant by the curtesy, in his late wife's freehold premisses, subject to the mortgage of the defendant *Scarse*.

On the 5th of *May* 1735, the *Master of the Rolls**, on hearing the cause, was of opinion, the defendant *Inglis* was not intitled to a tenancy by the curtesy, in the estate comprised in the mortgage (1).

The defendant appealed from this decree to *Lord Chancellor*, and the cause came on before his Lordship on the 28th of *January*, and 4th of *March*, 1737.

For the plaintiffs it was insisted, the equity of redemption was no actual estate or interest in the wife, but only a power in her to reduce the estate into her possession again, by paying off the mortgage; it was compared to the case of a proviso for a re-entry in a conveyance and no re-entry ever made, and to a condition broken and no advantage ever taken thereof; that the wife was never seised in fee in law, because the legal estate was out of her by virtue of the mortgage, but had only a bare possession, and was in receipt of the rents and profits; so that the mortgagor had merely a right of action, or a suit in a court of equity, in order that the estate might be re-conveyed to her upon complying with the terms in the mortgage; that it was the laches of the husband, he did not pay off the mortgage money, which would have re-vested the estate in the wife, but not having done that, there is no more reason that he should

(1) *Reg. Lib. A.* 1734. *fol.* 602.

be

be a tenant by the curtesy here, than that he should have the benefit of a seisin in law in the wife, which he cannot have, for there must be an actual seisin; for the words of Lord *Coke* in his comment upon the 35 *sect. of Littleton* are, *A man shall not be tenant by the curtesy of a bare right, title, use, or of a reversion, or a remainder, expectant upon any estate of freehold, unless the particular estate be determined or ended during the coverture.* It was likewise said, if it be considered as an interest, it is merely a contingent one, as it is uncertain whether the mortgagor will ever take back the estate again, for it was intirely at her election, and supposing it to be mortgaged to the value, though she had a right to redeem, yet she was under no obligation to do it; and it does not appear in this case the wife ever intended it, and if the law should cast the estate on the husband, he, by never paying the interest during his life, might load the inheritance in such a manner, that it would never be of any benefit to the heir. CASBORNE v. SCARFE. [604]

The Attorney General cited the case of *Penville* v. *Luscombe* (1), at the Rolls, the 4th of *February* 1728, where *the Master of the Rolls** was strongly inclined to think there could be no *possessio fratris* of an equity of redemption. He likewise cited the case of *Reynolds* v. *Messing*, at the Rolls, the 20th of *February* 1732†, where it was held a wife was not dowable of an equity of redemption in the case of a mortgage in fee (2); and in the case of *Robinson* v. *Tongue*, *Michaelmas* term 1730, Lord Chancellor *King* was of the same opinion (3).

* Sir *Joseph Jekyll.*

† Sir *Joseph Jekyll.*

Mr. *Fazakerley e contra*, insisted, that the husband's paying off the mortgage would have been buying what the law gives him as a tenant by the curtesy; that though at law a mortgage in fee is a revocation of a will, yet in a court of equity it is otherwise; and here a mortgagor is considered as having still the ownership of the estate, which is only a pledge or security for the money of the mortgagee, without making any alteration in the property, for the estate retains all its former qualities as any other not in mortgage.

That the argument *ab inconvenienti* falls to the ground, for as a tenant for life he will be obliged to keep down the interest during life, so that there is no danger of his injuring the inheritance: that there is a difference between a tenant by the curtesy, and a tenant in dower *with regard to a trust*, for there may be a tenancy by the curtesy of a trust, though a woman is not endowable of it; but what were the grounds of this distinction he would not take upon him to say, for as both by the decrees of this court, and in the house of Lords, it has been so determined without giving any reasons, he would not presume to offer any. 2 *Vern.* 585, and 680.

(1) S. C. cited 7 *Vin.* 160.

(2) This case is said to be misrepresented, and does not warrant the point here said to be determined by it. 1 *Bro. Cha. Rep.* 327. See *Godwin* v. *Winsmore*, *post.* 2 vol. 525.

(3) 3 *Vin.* 145. *pl.* 28. S. C.

Casborne v. Scarfe.

That in the case of *Perville* v. *Luscombe*, nothing was therein determined by the *Master of the Rolls*, who was very doubtful in the principal point; but Mr. *Fazakerley* said he had a note of a case, with the same names, determined by Lord *Cowper* in 1716, who held directly the contrary, that there might be a *possessio fratris* of an equity of redemption, and if so, the rule of *æquitas sequitur legem*, in cases of property, is certainly the best guide; and if this court upon niceties should relax this rule, it would be a precedent to dispense with it in other cases.

[605] He said, it was agreed the principal point had never been determined, tho' it is at the same time admitted there are many cases, where, after a recovery at law, either of dower or tenancy by the curtesy, a trust term has been laid out of the way for the benefit of dowress, &c.

Mr. *Murray* of the same side said, the statute of uses interposes only between a *cestui que trust* and his own feoffee, strictly speaking; that in this court, the *cestui que trust* is considered as the owner of the land, and the trustee, like the conusee of a fine, only the mere instrument, and no more. That the case of Lady *Radnor* v. *Vandebendy**, was affirmed in the house of Lords for this reason, because all conveyancers have insisted, that where there is a trust term, it may be safely purchased without any danger of dower, and is one reason for the distinction between a dowress and a tenancy by the curtesy.

* Show. Parl. Cas. 69.

That a mortgage in fee is no more than a charge upon the land; and that in the case of *Tabor* v. *Grover*, 2 *Vern*. 367. it was held, a mortgage in fee (tho' two descents cast, and tho' more was due upon it than the value, and tho' the mortgagor, by his answer, said he would not redeem) should go to the executor, and not to the heir of the mortgagee, the equity of redemption not being foreclosed or released. The several cases following were likewise cited by the defendant's counsel, 1 *Vern*. 329. *Hall* v. *Dunch*, 2 *Vern*. *Amhurst* v. *Dowling*, and *Strode* v. Lady *Russel*, 2 *Vern*, 625. and Lady *Williams* v. *Wray*, 8 *Co*. 96. and *Pawlet* and the *Attorney General*, *Hard*. 467, 469.

After the point had been argued on both sides, *Lord Chancellor* declared his surprize that this matter, as it seemed a case which must frequently happen, should never have been brought before the court till now, and as it was a question of great consequence and general concern, should take time to give his opinion.

On the 25th of *March*, 1738, the cause stood for judgment.

Lord Chancellor: This question depends on two considerations.

First, What sort of interest an equity of redemption is considered to be in this court?

Secondly, What is requisite to intitle the husband to be tenant by the curtesy?

First, An equity of redemption has always been considered as an estate in the land, for it may be devised, granted, or entailed with remainders, and such entail and remainders may be

An equity of redemption may be devised, granted, or entailed, and such entail may be barred by fine and by recovery, and the person intitled to it is the owner of the land, and a mortgage in fee is considered as personal assets.

be barred by a fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seisin; the person therefore intitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets.

CASBORNE v. SCARFE.

By a devise of all lands, tenements and hereditaments, a mortgage in fee shall not pass (1), unless the equity of redemption ...

If a testator after devising all his lands, tenements and hereditaments, forecloses an equity of redemption on a mortgage in fee, such estate will not pass by these general words of lands, &c. because a foreclosure is considered as a new purchase of the land.

(1) This rule as laid down here by Lord *Hardwicke*, and by the reports of the two cases of *Wynn* v *Littleton*, 1 *Vern*. 3. and *Litton* v. *Russel*, 2 *Vern*. 621. deserves some consideration. It is a point, which frequently occurs in the practice of a conveyancer. The question is, Whether we must understand his Lordship's meaning to be, that the general devise of all *lands, tenements and hereditaments* will neither pass the *legal* nor *beneficial* estate of mortgagees in fee after forfeiture, or whether those words are only incompetent to pass the *beneficial* interest? In the latter, the rule, generally speaking, is certainly right: because the *beneficial* interest being in fact nothing but the money due on the mortgage, and the lands mortgaged being considered in equity merely as a security for a personal debt, it is very evident that such *personal* or beneficial interest cannot pass by words peculiarly adapted to transfer *real* property; unless in some particular instances, as where the testator has had no other lands than those mortgaged to him, in which case the manifest intention would hold against the general construction. See *Clarke* v. *Abbot*, *Barn. Cha. Rep*. 457, 461. But I take it, that there is a very obvious distinction between the *legal* estate of a mortgagee in fee after forfeiture, and his *beneficial* interest, as to the operation of a devise. The latter would certainly pass by a residuary bequest of all his personal estate; yet it is clear, that the former would not; which, if not vested in some particular person by the will, would in such case descend to the *heir at law* of the testator as a *trustee* for the devisee of the personal estate. Vide *Attorney General* v. *Meyrick*, 2 *Ves*. 46. and the decree in *Wynne* v. *Littleton*, cited *infra*. But as the *mortgagee* is considered as to the legal estate and inheritance merely as a *trustee* (*vide post*. 606. 2 *Vern*. 401.) if he should devise *all and every his real estate* to *A*. and his heirs, this would according to the determination in *Marlow* v. *Smith*, 2 *P. W*. 198 pass the *legal* estate, and if he should likewise bequeath all his *personal* estate to *B*., this would pass the mortgage debt, and *A*. would thereby become a trustee for *B*. The reasoning in *Marlow* v. *Smith* was, that the legal estate being in the trustee, it was in the eye of the law *his* estate and *his* property, and therefore passed by a devise of *his* estate. If then there be a settled distinction between the legal and beneficial interest of a mortgagee, and if the words *real estate* will pass such legal estate, why will not the general devise of *lands, tenements and hereditaments* have that effect, when unconnected with circumstances indicative of the testator's intention to exclude such a construction? The word *hereditament* must, I think, be as operative as the words real estate. The former is expressive of the latter. It is said in Sir *Thomas Littleton*'s case, 2 *Vent*. 351 that, "if a man had lands "in fee, and other lands *mortgaged* to "him in fee, by a devise of *all his lands* "the mortgage would pass." The case *Ex parte Bowes*, 26th *July*, 1744, seems to confirm the above observations in their utmost extent. There, one *Thurland* mortgaged the reversion of the manors of *Bigging and Tamworth* and divers lands and hereditaments in the county of *Surry* to *Henry May* in fee, who by his will devises all his manors, farms, lands, tenements, hereditaments, and real estate in *Sussex*, *Kent*, and *Middlesex*, and *elsewhere* in *England* in possession,

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tion be foreclosed; and if, after such devise made, a foreclosure is had, yet such estate shall not pass by those general words of lands, tenements, and hereditaments, because a foreclosure is considered as a new purchase of the land.

A mortgage in fee, after a devise of the estate is in law a total revocation; in equity *pro tanto* only.

The interest of the land must be somewhere, and cannot be in abeyance; but it is not in the mortgagee, and therefore must remain in the mortgagor. *A.* devises his estate and after

possession, reversion, or otherwise to certain uses, which now vest an estate tail in *Thomas Knight* an infant, with remainders over. The mortgage money was paid to the executor of *May*; but the *legal* estate has not been reconveyed. The question now is, Whether the legal estate of the *mortgaged* lands was vested by virtue of the above devise in *Thomas Knight*, the infant? And if so, whether he could convey *by recovery* pursuant to the *Stat 7 Ann?* Lord *Hardwicke* decreed, the infant to convey the legal estate: "And it appearing *under the devise in the will of the said Henry May*, that the said *Thomas Knight*, the infant, *is tenant in tail*, with remainders over, it is ordered, that all proper parties are to concur in all necessary acts for the infant's suffering a common recovery, in order to make the conveyance effectual." *Reg. Lib. A.* 1743. fol. 537. It is very clear that the testator in the above case could not intend to create an *estate tail* in the legal estate of the mortgaged lands; and yet Lord *Hardwicke* thought that the legal operation of the devise ought to hold against the intent. As to the case of *Wynn* v. *Littleton*, which as reported in *Vernon*, is usually cited as an authority to the contrary; it appears from the Register's book, *B.* 1680. fol. 452. that it was decreed, that Lady *Littleton* (the administratrix) was entitled to the mortgages in question, as part of the testator's personal estate: and the decree directs, that upon payment of principal and interest by the mortgagor (who had brought a cross bill to redeem), "the said dame *Anne Littleton* and the *plaintiff* Sir *John Wynne* do convey and assure to the said Mr. *Prior* and his heirs all their title estate and interest in and to the said mortgaged premises." As the decree directs Sir *John Wynne* to be party in the re-conveyance, it is clear that he was supposed to have the legal estate in him, because the decree previously declared he had no beneficial interest by the devise. Now the Register's book does not mention whether he was *heir at law* to the testator, but merely that he was the testator's *near kinsman*, whilst administration was granted to Lady *Littleton* as next of kin. The doubt therefore still remains, whether the legal estate vested in Sir *John Wynne* as *heir at law*, or as *devisee*. If as devisee (and which I apprehend to be the case), then the above observations are established in their fullest extent. If as heir at law, it shews, that the *legal* estate does not even in equity necessarily follow the *beneficial* interest, and pass as personal property to the executor or administrator, but requires certain technical words, peculiarly adapted to the transfer of *real* property, in order to pass it. It is observable too in the above case of *Wynne* v. *Littleton*, that the testator had made a *charge* upon the lands devised, which rather seemed to shew, that those mortgaged were not intended to be the subject of the devise. With respect to the case of *Litton* v. *Russell* it can afford no argument on either side of the question: for the decree in that case, as it is stated in the Register's book, takes no notice of any mortgages, except those whereof the testator had after the making his will purchased the equity of redemption. Indeed it appears from the bill and answers, that there was only one other mortgage, which was of a *copyhold* estate, not surrendered to the use of the testator's will, *Reg. Lib. B.* 1707. fol. 510.

makes

makes a mortgage in fee, tho' that is a total revocation in law, yet in this court it is a revocation *pro tanto* only (1). CASBORNE v. SCARFE.

It is certain the mortgagee is not barely a trustee to the mortgagor, but to some purposes, *videlicet*, with regard to the inheritance he certainly is, till a foreclosure (2).

Secondly, At common law, four things are necessary to intitle the husband to the tenancy by the curtesy, *marriage*, *issue*, *death of the wife*, *seisin in fact*. In this case the three first concur, but it is objected, that here is no seisin whatever of the legal estate in the wife in the consideration of the law. But that is not the present question; the true question is, if there was such seisin or possession of the equitable estate in the wife, as in this court is considered as equivalent to an actual seisin of a freehold estate at common law, and I am of opinion there was.

Actual possession, cloathed with the receipt of the rents and profits, is the highest instance of an equitable seisin, both of which there was in this case, and that a husband shall be tenant by the curtesy of the equitable estate of the wife, has been often determined, as in *Sweetapple* v. *Bindon*, 2 *Vern*. 536. which was a much stronger case than this, for in that case there was neither seisin nor land, and in 2 *Vern*. 680. it was held that lands articled for only will pass by a will.

A husband shall be tenant by the curtesy of the equitable estate of the wife (3).

The principal objections are two.

First, Laches and neglect in the husband, by not paying off the mortgage.

Secondly, That the rule ought to be equal between dower and curtesy, and that dower cannot be of a trust estate.

As to the first, it is not similar to the cases of laches in the husband, *viz*. as in a case where entry is requisite, because it is nothing near so easy to pay off a mortgage as to make an entry; and it holds equally strong in the case of a trust estate, for a husband may more easily get a decree for his trustees to convey, than a decree to redeem a mortgage, which is necessarily attended with many delays.

The second objection proves too much, if any thing, and intirely fails by the precedents of this court: if any innovation were to be made, I am of opinion the nearest way to right would be, to let in the wife to dower of a trust estate, and not to exclude the husband from being tenant by the curtesy of it, and there can be no inconvenience to the heir at law, for he would have the same remedy in this court, to make a tenant by the curtesy keep down the interest as against any other tenant for life: for these reasons I am of opinion the defendant is intitled to be

An heir at law can oblige a tenant by the curtesy to keep down interest, as much as any other tenant for life.

(1) *York* v. *Stone*, 1 *Salk*. 158. *Perkins* v. *Walker*, 1 *Vern*. 97. *Hall* v. *Dunch*, 1 *Vern*. 329, 342. Duke of *Bridgewater* v. *Bolton*, 2 Lord *Ray*. 968. *Rian* v. *Wager*, 2 *P. W*. 334. *Parsons* v. *Freeman*, *post*. 2 vol. 748.

(2) See *Hard*. 467. 2 *Vern*. 401.

(3) So *Watts* v. *Ball*, 1 *P. W*. 108. *Chaplin* v. *Chaplin*, 3 *P. W*. 234.

CASBORNE v. SCARFE. tenant by the curtesy, and the decree at the Rolls, as to this part, must be reversed (1).

(1) *Reg. Lib. A.* 1737. fol. 408.

[607]

December the 8th, 1738.

Case 276.

Roberts v. *Dixwell*, *et e contra.*

Sir *T. S.* by will directs his trustees to convey a full fourth part of all his freehold lands, &c. to the use of his daughter *Priscilla* for life, and so as she alone, or such person as she shall appoint, take and receive the rents and profits thereof, and so as her husband is not to intermeddle therewith, and from and after her decease, in trust for the heirs of the body of the said *Priscilla* for ever: This being an executory trust, the wife took an estate for *life* only, and the husband therefore not entitled to be tenant by the curtesy.

SIR *Richard Sandys*, under his will, directs his trustees (1) to convey a full fourth part of all and singular the freehold lands, &c. in trust for the separate use of his daughter *Priscilla* for and during the term of her natural life, and so as she alone, or such person as she shall appoint, shall take and receive the rents and profits thereof, and so as her husband is not to intermeddle therewith; and from and after her decease, in trust *for the heirs of the body* of the said *Priscilla* for ever (2).

The principal question was, Whether this was a trust executed, or executory? For if executed, *Priscilla* was then tenant in tail, and her husband intitled to be a tenant by the curtesy; the contrary, if executory only.

Part of the lands devised being of the nature of gavelkind, and *Priscilla* having left two sons, another question was made, Whether these particular lands must descend in gavelkind, or go according to the rule of the Common law?

Mr. *Fazakerley* for the sons of *Priscilla*.

The question is, Whether the words heirs of the body, will be construed to give them an estate derived from their ancestor, or whether they take by purchase?

He insisted, that it appears to be the intention of the testator, that the husband should have no benefit, and therefore cannot be tenant by the curtesy.

The wife married improvidently, and against her father's consent.

She might have disposed of the rents and profits by will, there was not one moment of time, where the husband had the least right, or ever was in possession of any part of the estate.

He said he did not recollect any one case, where a husband can be tenant by the curtesy, unless he can shew seisin in him-

(1) After raising certain sums for payment of portions pursuant to a marriage settlement, and of his debts and funeral expences.

(2) The testator then gives the other three fourths to his three other daughters and the heirs of their bodies, and in case of the death of certain of his daughters therein named without issue, he gives the share of her or them so dying to the surviving daughters, "but the "share of his daughter *Priscilla* to be "*conveyed in trust as* aforesaid."

self

felf in right of his wife; upon the death of *Prifcilla*, the hufband here can have no right at all, for there is no longer a continuation of the wife's eftate. ROBERTS v. DILWALL.

He cited *Co. Lit. fol.* 30. *a.* to fhew, that a hufband muft have fome right even in the life-time of the wife, and that it commences in her life-time, and not at her death.

Where the wife has a feparate intereft, the court confiders her always as a *feme fole*; if he had nothing during the coverture, how could he intitle himfelf to any thing at the time of her death, when all her intereft was gone, and it is exprefsly laid down by Lord *Coke*, that a tenancy by the curtefy is initiate in the life-time of the wife. [608]

Mr. *Attorney General* for the defendant.

He infifted, where a truft eftate is attended with all the fimilar circumftances that there could be in a legal eftate, to give a hufband a tenancy by the curtefy, this court will make no difference in the conftruction.

Lord Chancellor: The queftion is, how this truft ought to be carried into execution, and in what manner the truftees ought to convey.

Prifcilla herfelf is dead, and yet it muft be confidered, what kind of eftate the truftees ought to have conveyed to her, if fhe had been living.

Firft, Whether to *Prifcilla* in tail, or to her for life only?

If the conveying an eftate tail would have anfwered the purpofe of the teftator in his will, then this cafe need not have been varied from former cafes.

But I am of opinion, the conveying an eftate tail here would have defeated the intention of the teftator.

To be fure, where an eftate has been granted or given by will to *A.* for life, and to the heirs of the body of *A.* fuch a devife has been, by the Common law, united fo in the firft perfon, as to convey to him an eftate tail; the fame conftruction too has prevailed with refpect to truft eftates.

But, in the prefent cafe, here are all forts of trufts, as to mortgage, fell, &c. (1) but the latter part of the truft is merely executory, to be carried into execution after the performance of the antecedent trufts; the whole direction therefore falls upon this court, and they are to direct how the parties are to convey.

This court have taken much greater liberties in the conftruction of *executory* trufts, than where the trufts are actually executed: as in the cafe of the Earl of *Stamford* v. Sir *John Hobart* (2), concerning Serjeant *Maynard's* will, which came o[illegible] ceptions to the Mafter's report, *Nov.* the 10th, 17[illegible] refolution affirmed in the houfe of Lords. The cafe of *Papillon*

(1) *Bagfhaw* v. *Spencer*, *poft.* 2 vol. 578. (2) 1 *Bro. Par. Ca.* 288. S. C.

v. *Voyce*,

ROBERTS *v.* DIXWELL.

v. *Voyre*, 2 *Wms*. 471. and Lord *Glenorchy* v. *Bosville*, *Cas. in Eq.* in Lord *Talbot*'s time, 3. (1).

These cases shew that the court have taken a greater latitude; and the point which has governed them, has been the intention of the testator.

The words here in trust for *Priscilla*, for and during the term of her natural life, and so as she alone, &c. have no doubt some meaning; and there is a particularity in the expression, because he has given plainly and expresly an estate tail to his other daughters in different parts of his estates, but I do not think that this alone would have been sufficient.

Things must not only be consistent in executory trusts, according to the intention of the testator, but must be done according to the form and method of conveyancing: now I do not know [609] any instance, where an estate for life conveyed by deed or will to the wife, for her separate use, has been construed an estate tail in the wife; if the testator had intended an estate tail, he would have done it by way of remainder.

Some stress has been laid upon the word *therewith*, as if it related to the last antecedent, the rents and profits, but it may be taken in a large sense, and refer to the whole fourth part.

If the wife had been intitled to an estate tail, I do not see but the husband must have been tenant by the curtesy.

It is said this is an executory trust, and nothing to be conveyed till all the other precedent trusts were executed, and consequently the estate continued in the trustees, and there was no seisin in the husband and wife.

In case of a trust-estate for payment of debts, or in the case of an equity of redemption, a husband may be a tenant by the curtesy of an estate devised to the wife, for her separate use.

But it has been held in a case of a trust-estate for payment of debts, and in the case of an equity of redemption, that a husband may be tenant by the curtesy (2); for in the case of a trust for payment of debts, it is only a chattel interest in the trustees (3), and the first taker has a freehold over.

Where a trust is executory, and to be carried into execution by this court, they will direct a conveyance of lands, notwithstanding they are *gavelkind*, to be made according to the rule of Common law.

If, therefore, a trust-estate is not such a one as is sufficient to bar the husband of his tenancy by the curtesy. The next question will be, Whether the devise to the wife for her separate use, will bar him? I am of opinion it will not, because here is a sort of a seisin in the wife (4).

My Lord *Coke* says, that to make a tenancy by the curtesy, there ought to be a right in the husband inchoate in the life of the wife; but he does not say, that he should be seised of the rents and profits.

(1) See also *Leonard* v. Earl of *Sussex*, 2 *Vern*. 526. *Bagshaw* v. *Spencer*, *post*. 2 vol. 246, 570, 577. *Baskerville* v. *Baskerville*, *post*. 2 vol. 279. *Read* v. *Snell*, *post*. 2 vol. 648.

(2) See *Casborne* v. *Inglis*, *ante*. 603.

(3) *Vide Trodd* v. *Downes*, *post*. 2 vol. 304.

(4) See *Hearle* v. *Greenbank*, *post*. 3 vol. 716.

Therefore

Therefore I think, if this had been an estate tail, he would have been intitled to be tenant by the curtesy, notwithstanding this court, by their authority, might have prevented the husband from intermeddling with the rents and profits during the life of the wife. ROBERTS v. DIXWELL.

But, upon the whole, I am of opinion the wife could not take an estate in tail, but took an estate for life only; and the grounds of those cases which have been mentioned, do not arise from the court's making a different construction upon a trust, than upon a legal estate, but that some circumstance in the will has induced the court to make a narrower construction.

Therefore, as it is plainly the intention of the testator, that the husband should have no manner of benefit from the estate, either in the life-time of the wife, or after her decease, (for immediately upon the death of the wife, it is conveyed in trust to the heirs of her body for ever), the husband of consequence is absolutely excluded, for a tenancy by the curtesy depends absolutely upon an estate tail.

As this is my determination on the construction of Sir *Thomas Sandys*'s will, the estate must be conveyed to Mr. *Richard Sandys*, the eldest son of *Priscilla*, and the heirs of his body, with remainder to the second son and the heirs of his body (1), and not according to the custom of gavelkind, because, agreeable to the opinion I have now given, it must go according to the rule of Common law, being not a trust executed, but executory, and to be carried into execution by this court. [610]

(1) *Reg. Lib. B.* 1738. fol. 119.

C A P. CXVIII.

Tithes.

(A) *Of a Modus.*

Clifton v. *Orchard*, clerk.

January the 28th, 1737.

Case 277. Issues directed by this court, to try a *modus*, though established by two verdicts, the plaintiff intitled to his costs at law only and not in equity.

THERE having been two verdicts in this case in favour of the plaintiff in equity, the *modus* was now established with the costs at law, but none were given with regard to the proceedings in equity, for *Lord Chancellor* said, the suit in this court was merely for the security of the plaintiff, and to prevent any farther impeachment of his right to *an exemption* from the

payment

Clifton v. Orchard. payment of tithes in specie, and that this was like the case of a bill brought to perpetuate the testimony of witnesses, wherein costs are never given against the defendant: That the plaintiff might have applied for a prohibition, and if he had succeeded therein at law, he would have had his costs, and he ought to have the same advantage with regard *to the proceedings at law* directed by this court, but that there was no pretence for any other costs (1).

His Lordship decreed the *modus* to be established, and ordered the defendant to pay costs to the plaintiff, in respect to the proceedings at law, to be taxed; but as to costs in equity, relating to the *modusses*, *his Lordship* did not think fit to award any to be paid by either of the said parties (2).

(1) See *Anon. post*, 2 vol. 14. (2) *Reg. Lib. A.* 1737. fol. 207.

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[611]

CAP CXIX.

Trade and Merchandize.

May the 18th, 1737.

Powell, senior and junior, —— Plaintiffs.

Elizabeth Monnier, Widow, and Executrix of *John Monnier*, —— —— Defendant.

Case 278.

THE plaintiffs, who were partners, the 3d of *April*, 1731, received a bill of exchange from *Charles Newburgh*, then dated and drawn on *John Monnier* for 50 *l.* to the plaintiffs or order, thirty days after date, indorsed by the plaintiffs, and negotiated by several persons; on the 15th of *April* it came into the custody of *Lavington* and *Paul* of *Exeter*, merchants, who sent up to *Monnier* the bill of exchange; he received it, and kept it ten days before the same became due, without making any objection, and, whilst he had it in his hands, wrote on the left side of the top thereof, N°. 84. and at the bottom the 6th of *May*, which the plaintiffs charged were the private mark or number of bills by him accepted, and intended to be paid, and upon the 6th of *May*, the time when payable, *Monnier*, on that day, sent it back to *Lavington* and *Paul*, and refused to accept it, or allow it as so much received by him on their account; whereupon *Lavington* and *Paul* demanded and received the 50 *l.* of the plaintiffs, who can have no satisfaction against *Newburgh*, he having become a bankrupt and insolvent, before the return of the bill.

The bill is therefore brought for 50 *l.* with interest due thereon: *Monnier* died after putting in his answer, and the cause has been revived against his executrix.

It was admitted, that *Newburgh* acquainted *Monnier* by letter of his having drawn the 50 *l.* bill, and desiring him to accept

accept and pay the same; to which *Monnier*, on the 13th of April, wrote a letter in answer, *that the 50 l. bill should be duly honoured, and placed to his debt.* Powell v. Monnier.

It was insisted for the plaintiffs, that if *Monnier* had not intended to accept and pay the bill, he should, according to the custom of merchants, have returned the same immediately to *Lavington* and *Paul*, whereby the plaintiffs might have got the 50 *l.* from *Newburgh*, who was then, and several days after, in good credit, and particularly in such credit with the defendant, that, after the plaintiff's bill came to his hands, *Newburgh* drew another bill of exchange on him for 18 *l.* three days after date, which was duly paid.

Mr. *Fazakerly*, who was counsel for the defendant, insisted, that the suit here ought not to be proceeded upon any further, but should go off to a trial at law, as it is a mere legal question.

Lord Chancellor: If *Monnier* had been living, I should have been of opinion, that the bill ought to have been dismissed; but now he is dead, and the suit is revived against his executrix, notwithstanding it is a legal question, the plaintiffs may bring their bill, and by praying satisfaction out of assets, and a discovery of assets, it is made a case, of which this court takes cognizance, any if they retain bills, where it is a legal demand, they must judge upon the facts relating to the legal demand, and, unless those facts are doubtful, will not dismiss the bill, and turn it over to a trial at law.

If this court retain bills where it is a legal demand, they must judge upon the facts relating to such demand.

Mr. *Fazakerly* then, *upon the merits alledged*, that *John Monnier* kept the 50 *l.* bill till the 6th of *May*, merely in expectation of receiving money or effects from *Newburgh* to answer it, and that, in receiving it from indorsees, he entered it in his bill book, as he constantly did all bills he received, whether good or bad, and that it was then entered at or against N°. 84, and therefore wrote that figure on the top of it, and that it did not denote the number of bills accepted or entered to be paid by him, and that writing *the 6th of May* denoted the day the defendant returned the bill, that *Newburgh* not remitting any effects to answer it, he returned it to *Lavington* and *Paul*; that, at the time of drawing the bill, *Monnier* had not, nor hath since had, any effects of *Newburgh's* in his hands; that when *Monnier* returned the bill to *Lavington* and *Paul*, he wrote to them as follows; *You remitted me* Newburgh's *bill, which I do not pay for reasons, therefore please to credit me, and note* 50 l. *the same being due to-day, and let the indorsees reimburse you.* And therefore, upon all other circumstances, this is not such an acceptance as will make *Monnier* liable to pay it.

Lord Chancellor: The principal question is, Whether this is a sufficient acceptance to charge the defendant, and if there was any doubt of it as to the fact, or whether in law, what has been done amounts to an acceptance, it might still be ne-

POWELL *v.* MONNIER.

cessary to send the parties to a trial at law, but I think there is no doubt of either.

If a person on whom a bill of exchange is drawn, says in a letter to a drawer, *it shall be duly honoured and placed to your debit*, this is an acceptance, and will make him liable, for a parol acceptance has been held to be good, and so determined in a case made for the opinion of the court of King's Bench in the time of Lord *Hardwicke*, Ch. Just.

Monnier, when the bill was sent to him, received it, entred it in his book, as his course of trade is proved to have been, under a particular number, and wrote that number under the bill; now it has been said to be the custom of merchants, that if a man underwrites any thing, let it be what it will, that it amounts to an acceptance; but if there was no more than this in the case, I should think it of little avail to charge the defendant, because that matter has been fully explained; but what determines me are *Monnier*'s letters, by which it appears very clearly that he has accepted of it, in one he particularly mentions the 50*l.* bill, and says it shall be duly honoured, and placed to the drawer's debt; nor is there in his letters to *Newburgh*, or the indorsees, one expression that shews the least suspicion of *Newburgh*'s credit.

[612]

I think there can be no doubt, but an acceptance may be by letter, and has been so determined (1); there have been questions too, whether a parol acceptance could be good? Lord Chief Justice *Eyre* held it might, Lord *Raymond* held the contrary; and there was a like point before me at *Nisi prius*, in the cause of *Lumley* and *Palmer* (2), and I had a case made of it for the opinion of the court of King's Bench, where it was several times argued, and at last solemnly determined, that such acceptance is good, much more then must an acceptance by letter be good.

The payee of a note intitled to interest against the acceptor, tho' no protest, for all the damage that can be had in such a case is the interest.

As to the plaintiff's being intitled to interest, I was at first doubtful whether he could demand any; but on reading the statute of the 3d and 4th of Queen *Anne*, *chap.* 9. *sec.* 4. I think it a clear case that he is, tho' no protest for that is made necessary by the act, it being requisite only to intitle a payee to damages against a drawer, but does not mention *the acceptor* of a bill of exchange; and all the damage, therefore, that can be had in such a case is the interest.

Lord Chancellor decreed the defendant to pay to the plaintiffs the sum of 50*l.* together with interest for the same from the time of filing the original bill, at the rate of 4*l. per cent.* and further ordered, that she should also pay to the plaintiffs their costs of this suit, from the time of filing of the bill of revivor, to be taxed (3).

(1) See *Wilkinson* v. *Lutwidge*, 1 *Stra.* 648. also *Mason* v. *Hunt*, *Doug.* 297.

(2) 2 *Stra.* 100. S. C.

(3) *Reg. Lib. B.* 1730. fol. 332.

CAP. CXX.

Trust and Trustees.

(A) *What Acts of the Trustees shall defeat the Trust, or be a Breach of Trust in them.*

(B) *Of Resulting Trusts and Trust by Implication.*

(C) *Of Trusts to attend the Inheritance.*

(D) *Trustees how to account, and what Allowance to have.*

(A) *What Acts of the Trustees shall defeat the Trust, or be a Breach of Trust in them.*

Trinity Term, 1737.

Symance v. *Tattam.*

A Bill was brought to compel trustees to join in a sale, which would destroy the contingent remainders, and likewise the uses in a settlement made before marriage; the limitations were to the husband for 99 years, if he so long live, to the wife for her life, remainder to trustees to preserve contingent remainders, remainder to the heirs begotten on the body of the wife, remainder to the heirs of the husband; and the first declaration under it was that it was the intention of the settlement to make a provision for the children of the marriage, and a covenant on the part of the husband that he will not bar the estate tail to the wife, but will preserve the uses before limited and appointed. Case 279. [614]

Lord Chancellor: There are many cases in which the court will compel the trustees to join in such conveyance as will destroy contingent remainders, but then it must be in some measure to answer the uses originally intended by the settlement: and has been usually done in the case of old settlements only, as in *Winnington* v. *Foley* *, but I believe no instance, where

This court will not compel trustees to join in a sale, which will not only destroy contingent remainders, but all the uses in a marriage settlement, for they are guilty of a breach of trust, in joining to destroy contingent remainders, whether the settlement be voluntary, for a valuable consideration, or by will (1).

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* 1 *Wms.* 536. *There*, in a marriage-settlement, the husband was made tenant for 99 years, if he so long lived, remainder to trustees during the life of the husband to preserve

(1) See *Woodhouse* v *Hoskins*, *post.* 3 vol. 22.

SYMANCE v. TATTAM. where they have compelled such trustees to join with the father termor for 99 years, and the son to sell the estate.

The old notion was, that these trustees were only honorary; but this has been varied since, for in the case of *Pigot* v. *Pigot*, Lord *Harcourt* was of a different opinion, *and in Mansell* v. *Mansell*, 2 *Wms*. 610. *Lord Chancellor* King, *assisted by Lord Chief Justice* Raymond *and Lord Chief Baron* Reynolds, *was of opinion, that trustees for supporting contingent remainders, joining to destroy them, were guilty of a breach of trust, and that there was no diversity, whether the settlement be voluntary, or for a valuable consideration, or by will only.* But the reason of those cases turned upon what the court should do, after trustees had actually destroyed the remainders; here the case is different, for the application to the court is to compel the trustees to do an act which would destroy the remainders.

There is another difficulty besides, which is, the husband's actually covenanting in the settlement, that he will not bar the estate tail to the wife, but preserve the uses before limited, and even though the husband were dead, the wife could not do any act by which she could bar the estate tail, notwithstanding the trustees should consent to join with her; for she is absolutely restrained from barring it by the 11th of *Hen.* 7. *ch*. 20. †.

[615] If it had been an application only to destroy the contingent remainders, I should have taken more time to consider; but here it would overturn all the uses of a marriage settlement, which would be assuming too much power, and would be making a decree to compel a breach of the husband's own covenant.

The bill was dismissed.

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preserve contingent remainders, &c. remainder to the first, &c. sons of that marriage in tail male successively; a son was born, and of age, the wife dead, the son being in treaty for a marriage, which appeared to be a beneficial one for the family; Lord Chancellor *Parker* decreed the trustee should join with the father and son in barring this, and making a new settlement.

† "If any woman which shall hereafter have any estate in dower, or for term of "life or in tail, jointly with her husband, or only to herself, or to her use, in any "manors, lands, &c. of the inheritance, &c. of her husband, and shall hereafter "being sole, or with any other after-taken husband, discontinue, alien, &c or "suffer a recovery of the same, such recovery, discontinuance, alienation, &c. "shall be utterly void and of none effect."

Easter Term, 1738.

Ivie v. *Ivie*.

Vide title *Devise, under the Division, What Words pass an Estate Tail.*

February the 9th, 1739.

Anne Thayer, Widow and Executrix of *John Thayer*, Esq; deceased, —— } Plaintiffs.

Jane Gould, Widow and Executrix of *Nathaniel Gould*, Esq; deceased, who was Executor of *Humphrey Thayer*, Esq; deceased, and *Stephen Collins*, —— —— } Defendants.

Case 280.

S.C. cited post. 2 vol. 245. 1 Vef. 519.

THE case arose upon the settlement made after the marriage of *Anne Collins*, now the plaintiff *Anne Thayer*, with *John Thayer*, the chief intent of which was to secure two several sums of 1000 *l.* one to be advanced by the intended husband, and the other by Mr. *Collins*, the father of the plaintiff.

By settlement before marriage it was agreed, that 2000 *l.* in the hands of a trustee, should be laid out in land, to the use of the husband for life, then to the wife for life for her jointure, and to the children equally; and in case the husband died without issue, to the wife in fee; and if he survived, to him in fee. The husband and wife being necessitous, the trustee paid them 600 *l.* on a release, and their joint bond of indemnity, and afterwards 400 *l.* more on the like bond, and a new agreement that the remaining 1000 *l.* should be laid out in the purchase of an annuity, for the separate use of the wife during the coverture, and in fee in case of survivorship. The trustee afterwards paid the husband this 1000 *l.* likewise; he is dead without issue, and left the wife destitute. Bill brought against the representative of the trustee for this breach of trust in him, as to be paid what should be due to the wife for the 2000 *l.* out of his personal estate.

In *March* 1738, the *Master of the Rolls* decreed, that the wife should be paid what should be remaining due to her for the 2000 *l.* and interest out of the trustee's personal estate in a course of administration.

Upon appeal to *Lord Chancellor*, he recommended it to the parties, from hardship on one side, and dangerous consequence on the other, to find out a third way of moderating the affair.

The agreement afterwards of the executrix of the trustee to pay the wife of the *cestuique trust* an annuity of 100 *l.* quarterly, during her life, free of taxes from *Lady-day* 1737, and the costs of the suit was made an order of the court.

Mr. *Thayer*'s 1000 *l.* was a sum he was intitled to under the trusts of a term; Mr. *Collins*'s 1000 *l.* was paid in. By the settlement it was agreed that the 2000 *l.* which was placed in the hands of *Humphrey Thayer*, one of the trustees, and brother of the husband, should be laid out by him, and the defendant *Stephen Collins*, the other trustee, and uncle of the plaintiff, in the purchase of lands, to the use of the husband for life, then to the wife for life for her jointure, in bar of dower, and to the children of the marriage, share and share alike; and in case of the husband's dying without issue, to the wife in fee; [616] and if he survived the wife, to him in fee, with the common appointment of paying the interest of the 2000 *l.* to the husband, till it was invested in lands.

THAYER v. GOULD.

Some time after the marriage, the husband and wife joined in an application to the trustee, *Humphrey Thayer*, to raise the money to assist them in their necessities, and upon his paying them 600*l.* they both gave him a release for so much, and likewise a joint bond to indemnify him; and upon receiving 400*l.* more from him afterwards, another bond of the like nature. The husband and wife came to a new agreement, that the remaining 1000 *l.* should be laid out in the purchase of an annuity, which should be for the sole and separate use of the wife during the coverture, and in fee in case of survivorship; the husband afterwards found means to prevail upon *Humphry Thayer* to pay him this 1000 *l.* likewise (1). The husband died without issue, and left the plaintiff destitute, there being no assets.

The bill was brought against the representative of *Humphry Thayer*, for this breach of trust in him, and to be paid what should be due to the plaintiff for the said 2000*l.* out of his personal estate.

The cause was first heard in *March* 1738, before Sir *Joseph Jekyll*, "who referred it to a Master to see what was due to the "plaintiff for the 2000*l.* placed in the hands of *Humphry Thayer*, "by virtue of the plaintiff's marriage settlement, and to take "an account of the assets of *John Thayer*, come to the hands of "his widow, and what should appear to have come to her hands, "after payment of debts of a superior nature, was to go in dimi- "nution of what should be found due to the plaintiff for the "2000*l.* and interest, and to take an account also of the per- "sonal estate of *Humphrey Thayer* come to the hands of the de- "fendant *Jane Gould*, or of *Nathaniel Gould*, her late husband, "*and the plaintiff was to be paid what should be remaining due to* "*her for the said* 2000l. *and interest, out of the said* Humphrey "Thayer's *personal estate in a course of administration.*" (2).

The defendant *Gould* appealed from this decree, and on the 24th of *November*, 1739, it came on before *Lord Chancellor*.

For the plaintiff was cited *Mary Portington*'s case, 10 *Co. Rep.* 42. *b.* where it is laid down, "That no feme covert shall "be barred by her confession of her inheritance or freehold, but "when she is examined by due course of law; and that is the "cause, that if the husband and wife acknowledge a statute or "recognizance, it is void as to the wife, although she survives "her husband; so if the husband and wife acknowledge a deed to "be enrolled, and it is enrolled, it is void as to the wife; and the "reason is, because no such writ is depending against the hus- "band and wife, upon which the wife may by law be examin- "ed." From hence they argued, that no act, in which the plain- [617] tiff joined with her husband, could make any alteration in the uses of the settlement, and that as money to be laid out in land is considered as land, she is intitled, notwithstanding her release, to have it conveyed to her in fee. The 7th of *Edward* 4. *fol.* 14. *b.* *Mansell* v. *Mansell*, 2 *Wms.* 610. *Palmer* v. *Trevor*,

(1) *Stephen Collins* the other trustee was not privy to any of these transactions.

(2) *Reg. Lib. B.* 1738. fol. 231.

1 *Vern.*

1 *Vern*. 261. *Rutland* v. *Molineaux*, 2 *Vern*. 64. were also cited, and it was insisted by the plaintiff's counsel, that the case of *Baker* v. *Child*, 2 *Vern*. 61. is no authority for the defendant, because falsely reported; for though it is said there the court was of opinion, "Where a feme covert agrees to join with "her husband in making a surrender, or levying a fine, and he "dies before it is done, equity will compel her to perform the "agreement;" *yet it was in fact no more than a recommendation by the court (the parties being present and consenting) to Serjeant* Rawlinson, *to make an end of the affair between the parties by his private award, which was to be final* (1). And what makes it still a stronger case against *Humphry Thayer* is, that the co-trustee *Stephen Collins*, though the plaintiff's own uncle, was intirely unacquainted with any of these transactions, and not trusted for fear he should refuse his consent to this iniquitous scheme. THAYER v. GOULD.

The *Attorney General* for the defendants insisted, this was not an interest in land, because no fine could be levied upon it while it continued in money, and that being personal, her contract with her husband would bind her, though a feme covert, and cited the case of *Theobalds* v. *Duffoy*, *Mod. Cas. in Law and Equity, 2d part*, 101. where it was laid down that the contract of a feme covert, where it was with the consent of her friends, was good. He also cited the case of the Countess of *Portland* v. *Progers*, 2 *Vern*. 104.

Lord Chancellor: I foresee great hardship on the one side, and dangerous consequences on the other, and have very great doubts with myself what decree I shall make; and therefore recommend it to the parties, as it is a case of considerable difficulty, to find out a third way of moderating this affair (2).

As an annuity was originally intended to be purchased for the wife in the life-time of the husband, by way of compensation for the trustees paying in of the money, some method may be contrived to make that effectual; and therefore let the cause be adjourned till the first day of rehearings, to give the parties an opportunity of settling it among themselves.

The cause standing in the paper to-day, and the plaintiff's counsel alledging that the parties had come to an agreement in writing, signed by the plaintiff and defendant, and praying that the same might be made an order of court, and a counsel for defendant consenting;

His Lordship ordered the agreement to be made an order of the court, and, pursuant thereto, decreed the defendant *Jane Gould*, out of the estate of *Humphrey Thayer*, to pay to the plaintiff *Anne Thayer* an annuity of 100 *l*. payable quarterly, free of taxes, during her life, and that she should also forthwith pay to her the arrears of the said annuity, from *Lady-day* 1737,

(1) See *Hody* v. *Lun*, 1 *Roll. Ab*. 375. *Daniel* v. *Adams*, *Amb*. 495. 497. 498.

(2) See *Smith* v. *French*, *post*. 243. 246.

TRAVERS v. GOULD. and that she should likewise pay the plaintiff the costs of this suit (1).

(1) *Reg. Lib. B.* 1739. fol. 152.

(B) *Of Resulting Trusts, and Trusts by Implication.*

Trinity Vacation, 1737.

Taylor v. *Taylor.*

Vide title *Evidence, Witnesses, and Proof, under the Division, Where Parol or Collateral Evidence will, or will not, be admitted to explain, confirm, or contradict what appears on the Face of a Deed or Will.*

Vide title *Copyhold.*

February the 9th, 1738.

Hill v. *The Bishop of London, Smith*, and Others (1).

Case 281.

R. S. incumbent of the rectory of *B.* devises his perpetual advowson, donation and patronage of the parish church of *B.* and all glebe lands, profits, and appurtenances to the same belonging, to *G. S.* willing and desiring her to sell and dispose of the same to *Eton* college, and on their refusal, to *Trinity* college, *Oxford*, and on the refusal of both these societies, to any of the colleges in *Oxford* or *Cambridge*, who will be the best purchaser. There is in this case no resulting trust of the advowson of *B.* to the heirs at law of the testator, but a devise of the beneficial interest therein to *G. Smith*, with an injunction only to sell to particular societies.

RICHARD *Smith*, incumbent of the rectory of *Bushey*, in the county of *Hertford*, by his will dated the 1st of *October* 1713, devised in these words: "As for my worldly goods "with which it hath pleased God to bless me, after my debts "paid and funeral expences discharged, I dispose thereof as "follows: *First*, I give, devise and bequeath my perpetual "advowson, donation, and patronage of the parish church of "*Bushey*, in the county of *Hertford*, and all glebe lands, pro-"fits and appurtenances to the same belonging unto my "honoured mother-in-law, Mrs. *Grace Smith*, willing and de-"siring her to sell and dispose of the said perpetual advowson "and patronage, with the appurtenances, as soon as she conve-"niently and lawfully may sell and dispose thereof, to the "fellows of *Eton* college in the county of *Buckingham*, and their "successors, or to the fellows of *Trinity* college in *Oxford*, where "I had my education; the fellows of *Eton* college to have the "first offer, if they will agree to purchase it; and upon their "refusal or disagreement, to be sold to the fellows of *Trinity* "college in *Oxford* and their successors, if they will agree to "purchase it; and upon the refusal or disagreement of both "these societies, for the purchasing of the said perpetual ad-"vowson, with the appurtenants thereof, to be sold to the "fellows and society of any one of the colleges in *Oxford* or

(1) *Reg. Lib. A.* 1738. fol. 609.

"*Cambridge*, who will be the best purchaser. *Item*, I give "and bequeath all my freehold lands and tenements in the pa- "rish of *Oldenham*, in the county of *Hertford*, with the ap- "purtenances, unto my said mother-in-law, Mrs. *Grace Smith*, "and to her heirs and assigns for ever: *Item*, I give to *Thomas* "*Wood* 20 *s.* and 20 *s.* to my cousin *Mary Wicks*, and all "the rest of my goods and chattels" (except a silver tankard, which I give to my cousin *John Smith*) "I give and bequeath "unto my honoured mother-in-law, Mrs. *Grace Smith*, whom "I make my sole executrix."

HILL *v.* The Bishop of LONDON.

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The plaintiffs, the cousins and co-heiresses at law of *Richard Smith* the testator, presented *Cleave Greenhill*, and *Grace Smith* presented the defendant *James Smith* to the living of *Bushey*: the present bill therefore is brought in order that the bishop of *London* may be injoined from accepting *James Smith*, and that *his Lordship* may grant institution to *Cleave Greenhill*; the plaintiffs insisting that the testator did not intend the present avoidance should go to *Grace Smith*, but that she ought to be considered altogether as a trustee for the heirs at law of *Richard Smith*, and more especially as to the present avoidance: the defendant *Grace Smith* insisted on the other hand, that it is not a trust, but an absolute devise to her.

On the arguing this question the first time, *Lord Chancellor* was of opinion with the plaintiffs, that it was a trust in the defendant to sell the advowson under the restrictions in the will, and also for the payment of the debts of the testator, and after those were paid, a resulting trust as to the surplus for the benefit of the heirs at law, and that the presentation was in them as *cestuique trusts*.

But *his Lordship* a day or two after, doubting, he ordered the case to be spoke to again, by one counsel of a side, and then took time to give his opinion, and on the 19th of *August*, 1739, gave judgment.

The general question on this devise is, Whether there be a resulting trust, or not? On the first hearing I inclined to think, that there was, but I have changed my opinion intirely: the general rule, that where lands are devised for a particular purpose, what remains after that particular purpose is satisfied, results (1), admits of several exceptions (2). If *J. S.* devise

The general rule, that where lands are devised for a particular purpose, that what remains after that purpose is satisfied, results, admits of several exceptions.

(1) As instances of this *general rule*, see *Randall* v. *Bookey*, 2 *Vern.* 425. *Prec. Cha.* 162. S. C. *City of London* v. *Garway*, 2 *Vern.* 571. *Hobart* v. *Suffolk*, 2 *Vern.* 644. *Bristol* v. *Hungerford*, 2 *Vern.* 645. *Starkey* v. *Brooks*, 1 *P. W.* 390. *Cruse* v. *Barley*, 3 *P. W.* 20. *Stonehouse* v. *Evelyn*, 3 *P. W.* 252. *Digby* v. *Legard*, 3 *Cox's P. W.* 22. *Gravenor* v. *Hallum*, *Amb.* 643. *Arnold* v. *Chapman*, 1 *Vesf.* 108. *Ackroyd* v. *Smithson*, 1 *Bro. Cha. Rep.* 503. *Leslie* v. *Devonshire*, 2 *Bro. Cha. Rep.* 188. *Robinson* v. *Taylor*, *ibid.* 589. *Hutcheson* v. *Hammond*, 3 *Bro. Cha. Rep.* 128. *Spinks* v. *Lewis*, 3 *Bro. Cha. Rep.* 355. *Sherrard* v. *Lord Harborough*, *Amb.* 165. *Robinson* v. *Taylor*, *Vesf.* jun. 44.

(2) So *Coningham* v. *Mellish*, *Prec. Cha.* 31. *Rogers* v. *Rogers*, 3 *P. W.* 193. *Mallabar* v. *Mallabar*, *Ca. temp. Talb.* 78. *Durour* v. *Motteux*, 1 *Vesf.* 320. *Cook* v. *Duckenfield*, *post.* 2 vol. 562. *Wright* v. *Row*, 1 *Bro. Cha. Rep.* 61. *Popham* v. *Lady Aylesbury*, *Amb.* 68.

lands

Hill *v.* The Bishop of London.

lands to *A.* to sell them to *B.* for the particular advantage of *B.* that advantage is the only purpose to be served, according to the intent of the testator, and to be satisfied by the mere act of selling, let the money go where it will, yet there is no precedent of a resulting trust in such a case: nor is there any warrant from the words or intent of the testator to say, this devise severs the beneficial interest, but is only an injunction on the the devisee to enjoy the thing devised in a particular manner. If *A.* devises lands to *J. S.* to sell for the best price to *B.* or to lease for three years, at such a fine, there is no resulting trust, so that the devise here amounts to no more than this; the testator gives the advowson to *Grace Smith*, but if such or such a college will buy it, then he lays an injunction upon her to sell, and therefore there are two objects of the testator's benevolence, *Grace Smith*, and *the colleges*.

There can be no construction of trust, but where the intent of the testator is apparent, *willing and desiring* G. S. to sell, &c. are more properly words of injunction, than trust.

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Where there is a resulting trust, the heir at law, after the particular purposes are satisfied, may by bill compel the trustee to convey to him, here he cannot; in all events the heir at *law is disinherited: or where the heir at law is intitled to a resulting trust, he may by bill compel the estate to be sold out and out; *here* he could not, if the colleges should refuse to buy. This circumstance differs the case from all the cases put, the word *trust* is not made use of, and if *Grace Smith* is a trustee, it must be by construction, and then the intent of the testator must be chiefly considered as a guide to that construction; and though many other words will create a trust, yet that must be where the intent of the testator is apparent, but here, *willing and desiring* are more properly words of injunction than trust (1).

The case of *Randal* v. *Booley*, 2 *Vern.* 425. cited for the plaintiffs, is the common case of a surplus undisposed of; so likewise in the case the City of *London* v. *Garway*, 2 *Vern.* 571. *no express trust was declared*, and yet the devisees were in all events to be considered as mere trustees, and in the case of *Hunt* and the countess of *Suffolk*, 2 *Vern.* 644. the devise was, *upon the trusts after mentioned.*

The case of *Coningham* v. *Mellish*, *Prec. in Chan.* 31. cited for the defendants, is a stronger case against the heir at law, than the present, for there the words *in trust* were used, *it being a devise of lands to his cousin* A. *and his heirs in trust to be sold for payment of his debts and legacies, and the surplus held to be no resulting trust for the heir.* In *Rogers* v. *Rogers* (2), *June* 1733, the words, *I leave my wife sole heiress and executrix*, amount to no more than devising the real and personal estate, then come the words, *To sell and pay his debts*, and if this had been sufficient, to make her a trustee, it would have been so upon that inaccurate expression, yet it was there held, she had *the beneficial interest* in the estate, and the court must in all those cases collect, if they can, the intent of the testator, from the particular circumstances of the case before them; in the case of *Mallabar* v.

(1) See *Harding* v. *Glyn*, *ante* 469. 470. n. 2.

(2) 3 *P. W.* 193. S. C. *Ca. temp. Talb.* 286. S. C.

Mallabar,

Mallabar, 5th of *May*, 1735, there was a clear intent, that the whole estate should be turned into money, and a trust expressly mentioned, and yet held by Lord *Talbot* to be no resulting trust (1).

Hill v. The Bishop of London.

No general rule is to be laid down, unless where a real estate is devised to be sold for payment of debts, and no more is said, there it is clearly a resulting trust; but if a particular reason occurs, why the testator should intend a *beneficial interest* to the devisee, there are no precedents to warrant the court to say, it shall not be *a beneficial interest*.

Where a real estate is devised to be sold for payment of debts, and no more said, there clearly it is a resulting trust.

As to the presentation that happened by the death of the testator, the heir at law cannot present, for the advowson being devised, it follows the devise, and cannot descend. *Vide Holt* and the bishop of *Winchester* in *Lev.* and as the heir cannot take by law, so neither can he in equity, for the devise here takes effect instantly, so does *the avoidance*, and it is a devise of the beneficial interest, accompanied with an injunction to sell to particular societies, and no other trust; if so, every thing else that is beneficial takes effect immediately in the devisee.

The devisee in this case, and not the heir at law, intitled to present on the avoidance that happened by the death of the testator.

His Lordship therefore declared, that there is no resulting trust of the advowson of *Bushey* for the heirs at law, and ordered that the plaintiffs' bill, so far as it seeks to have the benefit of any resulting trust for the plaintiffs, the heirs at law of the testator *Richard Smith*, in respect of this advowson, and of the presentation in the avoidance that happened by the testator's death, do stand dismissed, and that the injunction to restrain the bishop of *London* from accepting *James Smith*, and granting institution to him of the rectory of *Bushey*, do also stand dissolved. [621]

But *his Lordship* declared, that the plaintiffs the heirs at law are intitled to the copyhold lands descended to them, disincumbered from a mortgage, which must be paid out of the personal estate, and if not sufficient, then out of the real estate, charged by the will of the testator with his debts.

(1) *Ca. temp. Talb.* 78. S. C.

Hawkins v. *Chappel* and Others.

November the 7th, 1739.

Case 282.

WILLIAM *Hawkins* being patron and incumbent of *Simmonsbury*, by will dated the 5th of *February* 1734, devises all his lands in *S.* and the perpetual advowson of *S.* to Sir *William Chappel*, &c. upon trust in the first place to present his son *William* to this living, if he should be alive at the time of his decease, if not to such person as his wife should nominate, and

W. H. by will devises the perpetual advowson of *S.* to *W. C.* &c. upon trust to present his son *W.* to this living, and that after the church shall next after his death be full of an incumbent, then to sell the perpetuity, and to apply the profit arising from the sale, first for the payment of his debts, and the overplus he distributes in thirds to his daughters; the trustees presented *W.* the son, who died before the advowson was sold, leaving a daughter an infant, who by her next friend brings her bill, insisting after debts and legacies paid, there is a resulting trust to the heir at law of the testator in the advowson.

His Lordship of opinion, the whole legal estate is devised away, and no resulting trust for the heir at law.

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then he goes on and says, *That after the church shall next after my death be full of an incumbent, then to sell the perpetuity of it, and after such sale, to apply the profit arising from it, in the first place for the payment of his debts, and the overplus he distributes in thirds to his daughters, and to the daughter that was of age, he gives an immediate share, and the proportion of those under age he directs to be placed out in government securities; then comes this condition, that if any, or either of the daughters die before the age of* 21, *or marriage, their thirds to go to the son, provided he executed a deed for the confirmation of the will, and in case he should refuse, the third or thirds so lapsing, should go to the surviving daughter or daughters.*

The trustees presented *William* who died before the advowson was sold, leaving a daughter an infant, that by her next friend brings this bill, as heir at law to the testator, for an injunction to restrain the defendants the trustees from presenting any other clerk to the living of *Simmondsbury*, than a person nominated by the plaintiff, upon a suggestion, that after the testator's debts and legacies are paid, here is a trust resulting to the heir at law in this advowson, and that she has the right to nominate.

[622] *Lord Chancellor:* Of all the cases that have borne any argument for a resulting trust, this seems to me to be the strongest against the heir at law.

First question, Whether any resulting trust arises out of the devise of this advowson to the heir at law, or whether the ownership of it, or any spark of right, is descended to the heir at law?

Secondly, Whether the ownership is not in the daughters, by virtue of the devise under the will of the father?

At common law, where an estate is devised to trustees and their heirs, the whole is gone from the heir, but in equity there may be a beneficial interest remaining to the heir upon the trust.

It must be admitted, that at common law where an estate is devised to trustees and their heirs, the whole is gone from the heir; then the question will be, Whether in equity there is any beneficial interest remaining to the heir upon the trust of this advowson? and that must depend on the declaration of the trust by the will, whether the trust of the whole be declared, or whether any part be omitted; and in my opinion the trust of the whole is plainly declared, *if either of my daughters die before* 22, *or marriage, the share of her dying to be divided among the survivors:* an express trust also, to sell the perpetuity and divide the surplus among his daughters.

A certain rule in equity, that where an estate is charged with an incumbrance, or payment of creditors, and after such charge or payment, the surplus is given over, the whole property vests in the residuary legatee.

This is a devise of the inheritance clearly to the daughters, subject to the charge of the debts, for nothing is more certain in equity than that (where an estate is charged with an incumbrance, or with the payment of creditors, and after such incumbrance or creditors are discharged, the surplus is given over) the whole property or ownership of the estate vests in the devisee, or residuary legatee.

In the present case too, the heir at law is absutely disinherited, according to the intent of the testator, which appears by his direction, that the heir shall confirm his will under the penalty of losing the small contingent benefit in the surplus, and the true question is, Who is the real owner of the advowson? Now, whoever has the trust, is in this court considered as having the bene-

beneficial interest, and therefore the ownership of the estate, and that is the foundation of the case of *Roper* and *Ratcliff*; nor did Lord *Harcourt* differ with Lord *Macclesfield* in this general ground of equity, but in the consequences of that principle, and how it would operate upon the disabling statute against papists, the 11 & 12 *Will.* 3. c. 4. (a).

Hawkins v. Chappel.

(a) Vide Mod. Cas. in Law and Eq. 2d part, 167 & 181, and the New Abr. of Law, 3 vol. 795.

In the arguments for the plaintiff it is said, that though the debts or legacies should exhaust the whole estate, yet an heir at law may come into a court of equity, and compel trustees to give him the option of taking the estate upon payment of the debts, &c. but the reason of that is, because the court does not take into consideration, whether the estate is exhausted, but the right of the heir to the equity of redemption of the estate; nor do they give an election arbitrarily, that a person shall redeem or submit to the sale of an estate, for the privilege is not founded upon the election, but upon the property in and ownership he has of the estate.

The right of the heir to the equity of redemption of an estate, tho' debts and legacies will exhaust the whole, is not founded upon his election to redeem, or to submit to a sale, but upon the ownership he has of the estate.

If a man seised of an advowson be likewise incumbent of the living, and devises the advowson upon his death, the devisee will be intitled to nominate.

If *A.* seised of an advowson be also incumbent, and devises it, the devisee on his death is intitled to nominate.

But then it is objected, that Sir *William Chappel*, &c. are mere trustees, and that they can do nothing of themselves, and that somebody must nominate; why then should not the heir at law? for this plain reason, that if the ownership and property of the advowson is in the daughters, all the rest is a consequence of it; for wherever there is a right given, to say the heir is intitled, is to say, that he hath a right to the fruit fallen, without having any right to the tree, or the soil in which it grows.

If the ownership and property of the advowson be in devisees, that they, and not the heir at law, should nominate, is a consequence of such ownership.

It has been said likewise, that as it is money, and a mere personal interest, which is given to the daughters, that therefore there is a resulting trust for the heir at law; but whether a man has an advowson in him as a personalty, or a realty, it will make no difference, for the right of presentation will equally belong to him.

Nor will it make any difference, whether the devisee has the advowson in him as a personalty, or a realty.

Because the daughters have the money arising by the sale, it does not follow that they have nothing else given them; for if giving them so much money, gives them the beneficial interest in the advowson, every thing else, that is a consequence of such interest, will follow upon it; and therefore as the advowson is the daughter's property, the presentation is a beneficial interest, and will likewise belong to them.

It is objected too, that this interest of the daughters is a contingency, and to arise *in futuro*; but I am clear of opinion, it is a vested interest, for the produce of the money arising by the sale, is intended for a maintenance for the daughters who are under age, though not payable, till they arrived at twenty-one, and this is nothing but a regulation and direction for the

managing

HAWKINS v. CHAPPEL. managing of the eftate, till they come of age; and it has never been held in a court of equity, to alter the conftruction of a will.

Truftees poftponing, or accelerating the fale of eftates devifed to them, will make no alteration in favour of the heir to the prejudice of *ceftuique trufts*.

But it is faid, the daughters take nothing till the fale, and here the avoidance is before the fale, and that the delay of the truftees, in the fale of the advowfon, has made an alteration in the heir's favour.

It never was allowed in this court, that truftees poftponing or accelerating a fale, fhould make any alteration in the intereft of the *ceftuique truft*, becaufe fuch an admiffion would be putting it in the power of truftees, by fraud or collufion to deftroy the whole intention of a teftator.

It has been faid, that if the heir at law fhould nominate, it would not injure the daughters, becaufe the advowfon may fell after the *plenarty*, forafmuch as before, and fo it may, but ftill it might be fold for lefs, and if the daughters difpofe of the prefentation, they may for prudential reafons infert an old life, and then it would certainly fell for more than if there was a young one; and therefore I fhall not affume to myfelf a power of giving away the right of the daughters, upon a bare pof-[624]fibility that the heir at law's prefenting will not turn to their difadvantage.

I am therefore of opinion, that the legal and equitable eftate are devifed away by the will, and the ownerfhip in equity vefted in the *ceftuique trufts* of the furplus, and that the nomination to the prefent avoidance follows fuch equitable ownerfhip of the advowfon.

His Lordfhip therefore ordered the bill to ftand difmiffed, and the injunction upon the truftees to be diffolved.

March the 12th, 1738.

Hopkins alias *Dare* v. *Hopkins*.

Vide title *Remainder*.

(C) *Of Trufts to attend the Inheritance.*

Vide title *Creditor and Debtor*.

(D) *Truftees how to account, and what Allowances to have.*

Easter Term, 1737.

Jackson v. *Jackson.*

Vide title *Maintenance for Children.*

Vide title *Fines and Recoveries.*

Vide title *Evidence, Witnesses, and Proof.*

C A P. CXXI. [625]

Voluntary Deed.

(A) *The Effect thereof.*

After Hilary Term, 1736.

Oxley v. *Lee* (1).

LORD Chancellor said in this cause, he did not remember that this court ever decreed a voluntary conveyance to be delivered up to a purchaser, upon a valuable consideration, unless it appears there are some circumstances of fraud, attendant upon such conveyance (2): a case was mentioned to be determined by the late Master of the Rolls, where a voluntary conveyance was decreed to be delivered up, though no circumstance of fraud appeared.

Case 283. The court will not decree a voluntary conveyance to be delivered up to purchaser, on valuable consideration, unless obtained by fraud.

(1) *Lee* the elder leased the premisses in question to one *Stevers*, who in consideration of the natural affection he bore his daughter the wife of *Lee* the younger, and in consideration of 5 *s.* paid by *Lee* the younger, assigned over the lease to him. This lease was *after the marriage* assigned to a trustee in trust for *Lee* the younger for life, remainder to his wife for life, remainder to the issue of the marriage. The premisses were also subject to a mortgage. *Oxley* contracted for and absolutely purchased these premisses for a valuable consideration and without notice of the settlement or mortgage. *Decreed*, that the trustee should convey the legal estate to the purchaser, *that the settlement should be delivered up*, and that *Lee* the younger should pay off the mortgage money. *Reg. Lib.* 1736. fol. 188.

(2) See *Doe* v. *Routledge*, *Cowp.* 705. *Walker* v. *Burrows*, *ante*, 94.

Boughton v. Boughton (1).

December the 5th, 1739.

Case 284.

A voluntary deed kept by a person, and never cancelled, will not be set aside by a subsequent will (2).

LORD *Chancellor*: The first question in this cause is, Whether a will can have any effect to revoke a voluntary deed which was previous to it in time, and which is formal as to the execution, but very informal as to the several parts of it.

The case which has been cited before Lord *Macclesfield*, of *Naldred* and *Gilham*, 1 *Wms.* 577. is not applicable to every case, but was dependant upon particular circumstances: "There an old woman had executed a voluntary deed, which "she kept by her, her nephew surreptitiously got a copy of this "deed, the old woman afterwards destroyed the original: it "was heard first at the Rolls, when the late Master decreed, "that as the original was lost, the copy should supply the "place of it, and be effectual for the purpose intended by it; "an appeal to Lord *Macclesfield*, and he reversed the decree, "for he said he would not establish a copy surreptitiously ob-"tained, but left the party to his remedy at law, and that the "keeping the deed by her, implied an intention of revoking."

(1) A considerable real estate was settled on *E. Boughton* for life, remainder to his issue male, remainder to himself in fee, charged with a rent charge to his wife for life, and with terms for raising portions for younger children. *E. Boughton* having issue five daughters and no sons, and being possessed of a considerable personal estate, made an instrument dated 15th of *February* 1733, in these words, "Whereas I have heretofore by "several letters promised a certain gen-"tleman 3000*l.* down with my daugh-"ter *Anna*, and my estate at my death "if he should change his name to *Bough-*"*ton*; but he has affronted me; and "lest I should die, and they should be "taken advantage of, I do charge all "my estate with 4000*l.* a-piece to all "my children, and 100*l.* to my sister "*Cooke*, and 500*l.* a-piece to her two "sons; and I do hereby bind myself, "my heirs and assigns in 25,000*l.* to all "of my daughters to be paid to them at "my death, if all my real and personal "estate, (but what is charged to my "sister and her sons) shall not be divid-"ed equally among them. Witness my "hand and seal. *E. Boughton.*" Afterwards *E. Boughton* made a will to a very different effect, and died leaving his said daughters and no sons. The plaintiffs the daughters now brought their bill, when his Lordship declared, that the deed of the 15th of *February* 1733, is well proved and ought to be established, and that the same is not revoked by the subsequent will: and decreed, that the residue of the personal estate (after payment of debts, &c.) should be applied in payment of the said 100*l.* to *Cooke*, and 500*l.* a-piece to her two sons, and then be divided between the plaintiffs; and that the real estate (subject to the rent-charge to the wife) should also be divided among them. *Reg. Lib. A.* 1739. fol. 41. But see *Birch* v. *Blagrave*, *Amb.* 264.

(2) *Villers* v. *Beaumont*, 1 *Vern.* 100. So a *subsequent* voluntary conveyance shall not set aside a voluntary settlement. *Allen* v. *Arme*, 1 *Vern.* 365. *Clavering* v. *Clavering*, 2 *Vern.* 473. *Young* v. *Cottle*, 1 *P. W.* 102. But equity will not carry an *agreement* into execution without a *valuable* or *meritorious* consideration. *Colman* v. *Sorrel*, 3 *Bro. Cha. Rep.* 12. See *Williamson* v. *Codrington*, 1 *Vef.* 512. So a fraudulent deed is no revocation of a prior will. *Hawes* v. *Wyatt*, 3 *Bro. Cha. Rep.* 156.

But

But in the present case, here is a voluntary deed, without a power of revocation, not at all unfair, but only kept by him, and never cancelled.

The will is no more than voluntary, and as there is no case where a voluntary settlement has been set aside by a subsequent will, this no longer remains a question.

The next question is, upon the construction of the deed of settlement. [626]

I take it that the grantor of this deed imagined that 4000 *l.* a-piece to his five daughters, would exhaust his whole estate, but to provide against the event of the residue's being of a greater value, he binds himself in 25,000 *l.* to secure the surplus to his daughters, over and above the 20,000 *l.* This is a deed solemnly executed, signed and sealed, and must therefore be looked upon in nature of a bond to the daughters, and will certainly take place against all voluntary claimants (1); but creditors for a valuable consideration, would be preferred to it.

A father by settlement grants to his five daughters 4000 *l.* a-piece, but to provide against the event of the residue's being of greater value, binds himself in 25,000 *l.* to secure the surplus over and above the 20,000 *l.*

This must be considered in the nature of a bond to the daughters, and will take place against all voluntary claimants, otherwise as to creditors for a valuable consideration.

(1) See *Ward* v. *Lant. Pre. Cha.* 182.

C A P. CXXII.

Usury.

Vide title *Catching Bargains.*

Ex parte Thompson.

June the 4th, 1746.

Vide title *Bankrupt, under the Division, Rule as to Drawers and Indorsers of Bills of Exchange.*

C A P. CXXIII.

Will.

(A) *The Power of this Court over the Prerogative Office.*

(B) *The Validity of a Probate, where examinable.*

(A) *The Power of this Court over the Prerogative Office.*

November the 23d, 1738.

Frederick v. *Aynscombe.*

Case 285.

S. C. cited Amb. 345. S. C. ante 392. note 5 P.

Where a person is sole devisee of the real estate, and one of the witnesses to the will resides altogether abroad, upon a commission granted to examine such witness, the court will at the same time make an order, that the original will be delivered out by the proper officer of the prerogative court, to a person, to be named by the party praying the commission, in order to be carried out of the kingdom, he making a security to be approved of by the judge of the prerogative court, to return the same (1).

PHILLIP *Aynscombe* devised all his real estate to the defendant in fee, by a will executed at *Bullogne*; the defendant after the testator's death proved the will in common form, and the original will was deposited in the prerogative court of *Canterbury*: *John Hill* one of the witnesses resides altogether at *Bullogne*, and the defendant cannot get him to come from thence, and therefore necessary he should have a commission to be executed there, to examine the said witness, to prove the will, having brought a bill here to perpetuate the testimony thereto; at the execution of which commission it will be likewise necessary to have the said will; and application having been made for the prerogative office to deliver out the original will to be proved at *Bullogne*, the Register of that court refused to deliver it upon any security whatever, for the return of it, but insisted to send a messenger of their own, which will put the defendant to a considerable expence.

It was therefore moved by Mr. *Murray*, that a commission might go to examine witnesses at *Bullogne* in *France*, and that the Register of the prerogative court, or the record keeper, may forthwith deliver out to the defendant the original will of *Phillip Aynscombe*, upon the defendant's giving a reasonable security to return the same, after executing the commission upon the suggestion, that *Hill* resides wholly there, and is in such circumstances as will not allow him to come to *England*.

Lord Chancellor directed that the defendant be at liberty to take out a commission to examine his witness in *Bullogne*, in order to prove the will, and it appearing that the defendant is the only devisee who can claim any real estate under the will, ordered the original will to be delivered out by the proper officer of the prerogative court to a fit person to be named by the defendant, in order to be produced at the execution of the said commission; such person first giving security to be approved of by the judge of the prerogative court, to return the same in three months from the delivery of the same to him (2).

His Lordship also directed (as there have been precedents of wills being delivered out of the prerogative court upon trials at [628] assizes where they were necessary to be read at such trials, to save the expence of the Register of the prerogative office attending) that these precedents be searched, and this order to be

(1) See *Williams* v. *Floyer*, *Amb.* 343. *Lake* v. *Causfield*, 3 *Bro. Cha. Rep.* 263.

(2) *Reg. Lib. A.* 1738. fol. 52.

drawn conformable to them, and if there should be any dispute as to the security for the safe custody and return of the will, that it shall be referred to a Master in Chancery to settle and adjust the same. FREDERICK v. AYNSCOMBE.

If the defendant had not been the sole devisee of the real estate, but there had been other persons under the will interested in it, and they had refused their consent, he should not have made this order, because the taking a will out of the kingdom is different from any former cases in this court; they have gone no further than ordering them to different parts of *England*.

Lord *Macclesfield*, in a motion of this kind, made an order upon the prerogative court to deliver a will to the register office in *Symond's Inn*, to lie there till the court of Chancery should have done with it, and said at the same time, with some warmth, that he thought his officers of equal credit, and as fit to be intrusted with the custody of the will as theirs, or any other office whatever.

The court of Chancery, where a cause lays, will make an order upon the prerogative court, to deliver a will to the register's office, in Symond's Inn, and to lie there till the court of Chancery has no further occasion for it.

N. B. I was informed, by a gentleman of the bar, that there was another motion of this kind, in the time of Lord Chancellor *Talbot*, in the cause of *Mosse* v. *Roach* (1), who ordered the prerogative court to deliver a will, to be proved in *Gloucestershire*, under a commission from the court of chancery; and though it was strongly insisted upon, on the behalf of the prerogative office, that one of their officers should attend the execution of the commission, yet he absolutely denied it.

The court of Chancery, upon motion, ordered the prerogative office to deliver a will to be proved in Gloucestershire, under a commission from the court of Chancery, and would not suffer an officer of the prerogative office to attend the execution of the commission.

(1) 2 *Str.* 961 S. C.

(B) *The Validity of a Probate, where examinable.*

Sheffield v. The Dutchess of *Buckinghamshire*. October the 9th, 173[illegible].

THE bill was brought by Mr. *Sheffield* against the defendant the Dutchess of *Buckinghamshire*, for a perpetual injunction to all further proceedings in the suit in the prerogative court, for controverting or calling in question the will and codicils of *John* late Duke of *Buckinghamshire*, after the determinations already had, and opinions given by the court. Case 286.

A bill for a perpetual injunction to stay proceedings in the prerogative court for controverting the will and codicils of *John*, Duke of *Buckinghamshire*, after the determinations already had; *the injunction before granted made perpetual.*

Lord Chancellor: After hearing the case elaborately argued, I am of the same opinion as when I granted the injunction, and the case not being altered, the same reasons continue for making it perpetual. [629]

 Three

Sheffield v. Dutchess of Buckinghamshire.

Three questions arise in this case.

First, If this question has been already determined, or which is the same thing, whether the Dutchess of *Buckinghamshire* is concluded as to this point?

Secondly, If this question has been determined on proceedings in a proper court?

Thirdly, What will be the consequences of granting or not granting it?

The first depends on several facts and proceedings in this court, and admissions in her Grace's answers. Two bills have been brought by the late Duke of *Buckinghamshire*, *Edmund*, and Mr. *Sheffield*; both of them suggest the will and codicil to be duly executed, and both to be duly proved. The Dutchess was defendant to both the bills, and says in her answer she believes them both of the Duke's own hand writing, and insists on and claims legacies under them.

The will and codicil have been both proved in this court by witnesses examined on the part of the Dutchess, the cause heard, and the court have declared the will and codicil to be well proved, and decreed the trusts of them to be performed, and those trusts relate as well to personal as real estate.

The personal estate has been laid out under the decree of this court, and two great purchases also made under the direction of the court, and with the acquiescence of all proper parties, and a conveyance executed to trustees, and likewise an order pronounced for approving of the purchase, and a quiet enjoyment by the Dutchess of what was given her by the will, to this very time.

After Duke *Edmund*'s death, there was an appeal to the house of Lords by the Dutchess, not only in her own right, but expressly named as executrix of her son, insisting that the court had mistaken the construction, but not in the least complaining of the invalidity, or undue execution of the will or codicil. The decree of the court below was affirmed by the Lords in 1737.

I am of opinion therefore that by this series of facts and proceedings the Dutchess is concluded, unless new material evidence appears.

It is objected that this court has presumed the will and codicil to be well proved on the probate only, which has never yet been contested in the proper court.

Admission by a party concerned in matters of fact is stronger than if it had been determined by a jury, and facts are as properly concluded by admission, as by trial.

But it is not so, for here the probate has been strengthened by the admission of the parties concerned; and as to the matters of fact, an *admission* by a party concerned (1), and who is most likely to know, is stronger than if it had been determined by a jury, and facts are as properly concluded by admission as by a trial; as in writs of error, the party may admit error in fact, though he cannot admit error in law; and if this court was not to conclude on such admissions, there would be no end of causes here, where there is no jury at the bar.

(1) See post 2 Vol. 3.

It

It is objected the admission carries it no further than the probate would go of itself.

If the probate merely is produced, and nothing said about it, this court must presume it good, and proceed on it; but if parties are dissatisfied with the probate, this court will give time to dispute the validity of it, and suspend their determination, till it has had a trial in a proper court; as in the case of *Pain* v. *Stratton*, the court voluntarily gave time to try the validity, upon some apprehension of a difference between the probate and original will.

SHEFFIELD v. Dutchess of BUCKINGHAMSHIRE.

Where parties are dissatisfied with a probate, this court will suspend their determination, till a trial has been had of the validity in a proper court.

But here the case is very different; the party in this case, so far from being dissatisfied, that at the time of admitting the probate, the original was produced, and these rasures appeared on the face of it; and then, when if at any time this objection to the bill should have been made, they allowed the will well proved.

Second question. If it has been determined in a proper court? It is insisted that the validity of the probate is only proper to be determined in the ecclesiastical court, and that nothing done in a temporal court can conclude.

It is true, in an adversary way, this court, or a court of law, cannot determine the validity of a probate of a will or codicil (1); but if it comes here on an incident in a cause, and that incident is admitted by the parties, this court, or a court of law, may determine it, and hold the parties bound by their admission; and if either of the parties would afterwards bring a new suit to contest that determination, this court would certainly grant a perpetual injunction.

This court cannot determine the validity of a probate adversarily; but if it comes here incidentally, and that incident admitted, they may determine it, and hold the parties bound by their admission.

As to the distinction which has been offered between parties admitting things proper to be determined by the court, in which the admission is made, and admission of things cognizable in another court, I can see no difference if facts are admitted, and the parties establish their own admissions. Disputes about probates may be determined by a decree in a proper court, yet under the direction of this court, like the case where this court does not direct an issue, but gives liberty to bring a new ejectment.

No difference between parties admitting things proper to be determined by the court, in which the admission is made, and admission of things cognizable in another court, but are equally bound.

But what properly and effectually gives this court a jurisdiction here in the present case is, the *trust* declared in the will, the trusts this court have determined on, and every thing that comes in by incident binds the parties.

This question does not touch or impeach the jurisdiction of the ecclesiastical court, as in the case of a prohibition, where if the court proceeds, the judge is guilty of a contempt; but the injunction stays the party from proceeding, and at the same time this court supposes the ecclesiastical court to have jurisdiction, but does not think proper, from some collateral cir-

(1) See *Bennet* v. *Vade* post 2 vol. 324.

 cumstances,

SHEFFIELD v. Dutchess of BUCKINGHAMSHIRE.

cumstances, to suffer the party to apply, and take the benefit of that jurisdiction.

Thirdly, as to the consequences of granting the injunction or not.

It is objected, that this case is not a proper one for a perpetual injunction; that here is no vexation or multiplicity of trials, but that is not the only ground the court proceeds on in granting injunctions, tho' in mere legal titles it is so: It was not the ground in the case of *Acherly* v. *Vernon*, or of *Calvert* v. *Colby*, where in each there was only one trial.

New matter is the only solid ground of contesting this will, and if there had appeared any new material facts and evidence since the last hearing, I should not have granted the perpetual injunction; *but the rasures, &c.* objected to now, did appear on the face of the will, nor is there any proof that the Dutchess had no knowledge of them till after the hearing, nor is it disputed but that the rasures and interlineations are of the Duke's own hand writing.

An infant, unless there is new matter, or fraud or collusion, is bound by a decree made for his benefit; and with respect to personal estate, except for the causes before mentioned, the *parol* never demurs.

As to a new right accrued to her Grace as executrix of her son, that makes no alteration with regard to the consequences of the present question; he was bound by the decree; unless there is new matter, or fraud and collusion, an infant is bound by a decree made for his benefit (1), which this decree plainly was; and as to personal estate, unless for the causes before mentioned, the parol never demurs, and her Grace cannot be in a better condition than her son, for if a decree is for the benefit of an infant, and he dies, his executor shall never dispute that decree, tho' it may be for the advantage of the executor so to do.

Where there is a decree for the benefit of an infant, and he dies, his executor, tho' it may be for his own advantage to do so, shall never dispute that decree.

But here have been acts done by her Grace in this capacity since the death of her son, which bind her. An appeal to the house of Lords as executrix of her son, and insisting on and claiming under the will and codicil.

As to the authorities, *Acherley* v. *Vernon* is full for the plaintiff, unless new matter had been shewn; and *Calvert* v. *Colby* was a case not so strong as the present.

The case of *Montague* v. *Maxwell*, in the house of Lords 1715, cited for the defendant, does not come up to the present; there was nothing in that case but the probate simply, no admission, no proof in this court, nor any acts or judicial proceedings here. In the case of *Crompton* v. *Crompton*, there were only extrajudicial declarations.

If I was not to grant this injunction, many inconveniences must necessarily arise to the parties; the will made was in 1716, and proved, with the privity of the Dutchess, in 1721; the decree was in the same year, vast sums laid out, and an acquiescence of all parties; the decree affirmed in the house of Lords in 1737; then a new suit in the ecclesiastical court, to dispute the will on the same facts on which the precedent determinations were had, two witnesses are dead, who possibly, if living, might establish the will; if this was suffered, property would never be safe.

(1) See *Gregory* v. *Molesworth*, *post.* 3 vol. 626.

As

As to the truftees, actions at law, if the will was overturned, might be brought againft them for acting under the decree of this court, nor would it be in the power of this court to help them. SHEFFIELD v. Dutchefs of BUCKINGHAM-SHIRE.

His Lordfhip therefore decreed, that a perpetual injunction be awarded to ftay the defendant, the Dutchefs of *Buckinghamfhire*, from proceeding in the prerogative court of *Canterbury*, or in any other ecclefiaftical court, in the fuit already brought by her Grace, or in any other fuit, to call in queftion or revoke the faid probate of the will and codicils of *John* late Duke of *Buckinghamfhire* her late hufband, or to have the fame declared null and void, or that it may be pronounced that the faid Duke died inteftate; and as to the cofts of this fuit, his Lordfhip gave none.

Vide title *Legacies, under the Divifion, Ademption of it.*

Vide title *Evidence, Witneffes, and Proof, under the Divifion, Where parol or collateral Evidence will, or will not, be admitted to explain, confirm, or contradict what appears on the Face of a Deed or Will.*

Vide title *Power, under the Divifion, Of the right Execution of a Power, and where a Defect therein will be fupplied.*

CAP. CXXIV.

Witnefs.

Vide title *Evidence, Witneffes, and Proof.*

CAP. CXXV.

Words of Limitation.

Vide title *Devifes.*

CAP. CXXVI.

Words.

Vide title *Expofition of Words.*

CAP. CXXVII.

Writ.

(A) *Of the* De Homine Replegiando, *and its Effects.*

March, the 22d, 1736-7.

Case 287.

Treblecock's case.

The writ *de homine replegiando* is an original writ, and the party may sue it of right.

A Motion to discharge an order for superseding a writ *de homine replegiando*

Lord Chancellor, The writ *de homine replegiando* is an original writ, and the party may suit it of right, and granted here on a motion or petition, without shewing cause.

It is properly returnable in the courts of law, and may be there declared upon; and, as it is remedial, the defendant, against whom it is sued, is obliged to assign some cause why he does not comply with the writ.

Therefore after it is sued, I do not know that I can supersede it, and if the party who sues out the writ is not intitled to it, it must be pleaded to below; in this case it is the writ of the infant, and there is no suit about the infant here, and therefore the order made to supersede the writ must be discharged.

It might be otherwise, if the infant was in court, by being a party to the suit here.

If this writ is brought by an infant against his testamentary guardian, or by a villain against his lord, I think they may plead the special matter to the writ, and defend themselves at law.

His Lordship granted the motion.

Vide title *Ne exeat Regno.*

A

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A court of equity is very desirous of laying hold of any just ground to carry [illegible] into execution, made to establish the peace of a family and where it appears that such agreements are entered into with a view of saving the honour of a family, and are reasonable ones, the court will, if possible, decree a performance From *page* 2 to 6

An infant may have a decree upon any matter arising on the state of his case, though not particularly prayed by his bill 6

Where there is an agreement to suffer a recovery, and uses are declared, though it is suffered at a different time from the recovery, covenanted to be suffered; yet if no subsequent declaration of uses, it will enure to the uses so declared 7

Where there is a deed to lead the uses of a recovery [illegible] not in the power of tenant in tail [illegible] to declare any uses; but such subsequent declaration must be by all the parties concerned in interest *ibid*

The

The expression in the countess of *Rutland's* case, 5 *Co.* that, *whilst it is directory only*, new uses may be declared, means that as the uses must arise out of the agreement of the parties, they by mutual consent may change the uses *Page* 7

Where a court of law or equity find that the general and substantial intent of the parties was, that the estate should pass, they will construe deeds in support of that intention different from the formal nature of those deeds themselves 8

Where there is a recovery for strengthening the title of a purchaser, with a declaration of the uses to him and his heirs, notwithstanding a precedent one to different uses, it will not enure to make good such former declaration, but the uses of the purchase only *ibid.*

If tenant in tail makes a lease not warranted by the statute, and suffers a recovery, it lets in the lease and makes it good; the same as to a judgment, statute, or bond *ibid.*

The issue of tenant in tail by virtue of the statute *de donis* may avoid a prior lease, charge or estate made by him, but not he himself; but when by the recovery he has gained a fee, the issue being barred, all the reasoning for their avoiding estates, &c. made by him ceases 9

Where a tenant in tail suffers a recovery, he by construction of law is in of the old use, and the estate is discharged of the statute *de donis* *ibid.*

Where there is a valuable consideration for an agreement on all sides, there is sufficient ground to come into a court of equity, but a mere volunteer not intitled to come here for an execution of an agreement 10

An agreement upon a supposition of a right, though it may afterwards come out on the other side, is binding, and shall not prevail against the agreement of the parties *ibid.*

As to agreements made under parental influence 10

By a settlement before marriage securities for money belonging to the wife were assigned to a trustee, to be laid out in the purchase of freehold lands, to be settled among other uses to the first son in tail male, with like remainders to the second and other sons, remainder to the heirs female; the father and mother both dead, leaving two sons more besides the plaintiff and four daughters; the eldest son now prays by his bill that the sureties may be assigned to him, being tenant in tail, and not laid out in land, on the brothers and sisters appearing in court, and *consenting*, the trustee was directed to transfer the securities to the plaintiff *Page* 11 *note* 1

Though the vendor of an estate does not produce his deeds, or tender a conveyance within the time limited by the articles, the court does not regard this neglect, but will decree a sale *ibid.*

And see the cases in notes

Parol Agreements, or such as are within the statute of Frauds and Perjuries.

A. agrees for the purchase of an estate, but the agreement not reduced into writing, though *A.* in confidence thereof gives orders for conveyances to be drawn, and went several times to view the estate, this court will not carry such agreement into execution, and the statute of frauds may be pleaded to a bill brought for that purpose 12

A letter is not sufficient evidence of the agreement unless the terms of the agreement are mentioned therein; but where a man takes possession, or does any act of the like nature in pursuance of an agreement, this court will decree an execution of it *ibid.* See notes 1, 2, 3.

A performance of an agreement only of one side is not a dispensation of the statute of frauds and perjuries 499

Voluntary Agreements, in what Cases to be performed.

A settlement after marriage, in consideration of a portion paid by the wife's father, good against creditors 13

A settlement being voluntary is not for that reason fraudulent, but an evidence of fraud only, though hardly a case where the person conveying

was

was indebted at the time that it has not been deemed fraudulent *Page* 15
A voluntary ſettlement is not fraudulent where the perſon making is not indebted at the time, nor will ſubſequent debts ſhake ſuch ſettlement *ibid.*
Where the father tenant for life, and ſon tenant in fee, join in a ſettlement, it is good againſt creditors, for the ſon might have diſpoſed of the reſiduary intereſt without the father's joining 16
Where a father takes back an annuity to the value of the eſtate comprized in the ſettlement, it is *tantamount* to a continuance in poſſeſſion, and creditors will be relieved againſt ſuch ſettlement *ibid.*

[illegible] the M[illegible] of performing A[illegible].

Where [illegible] under a marriage ſettlemen[illegible] a contingent advant[illegible] the court will not vary it to the p[illegible] after the marriag[illegible] 17
The cour[illegible] tee for a [illegible] ſettlement [illegible] to a maſter to [illegible] a proper perſon 18

Adminiſtrators See **Executors.**

Alien.

The perſons of foreigners ſubject to the authority of this court only while in *England*, but though their perſons are out of the reach of proceſs, the property they have here is under its controul 19
The court directed a commiſſion to the *Eaſt Indies* to take the anſwer of the defendant, who was of the Gentoo religion, and impowered two or three of the commiſſioners, to adminiſter ſuch oath *in the moſt ſolemn manner as in their diſcretion ſhall ſeem meet*, and if they adminiſtered any other oath than the chriſtian, to certify to the court what was done by them, that if there ſhould be any doubt, as to the validity, the opinion of the judges might be taken *ibid.*
The court will not ſtay proceedings in an original cauſe until the anſwer comes in to the croſs bill, but will only ſtay publication. *Page* 21
The depoſitions of witneſſes of the Gentoo religion, ſworn according to their ceremonies, ought upon the ſpecial circumſtances of the caſe to be read as evidence in the cauſe *ibid.*
Heathens admitted as witneſſes by the civil law, by the law of nations, and by the common conſent of mankind 21
A *Jew* a competent witneſs to prove a murder 42
By the policy of all countries oaths ought to be adminiſtered to perſons according to their own opinion, and laying the hand on the book, *&c.* originally borrowed from the pagans *ibid.*
That Turks and Infidels are *perpetui inimici*, and therefore not to be admitted witneſſes here, is a common error founded on a groundleſs opinion of juſtice *Brooke* *ibid.*
The neceſſity of trade has mollified the too rigorous rules of the old law in their reſtraint of aliens 43
The law of *England* not confined to particular caſes, but governed more by reaſon than any one caſe whatever *ibid.*
If theſe witneſſes were here they would be liable to a proſecution for perjury, and might be indicted upon a ſpecial indictment *ibid.*
Tactis ſacris evangeliis not neceſſary words in an indictment of perjury, for ſeveral old precedents are that the party was *Juratus generally* *ibid.*
Some infidels may under ſome circumſtances be admitted as witneſſes *ibid.*
The Jews before their expulſion from *England*, and ſince their return to it, have been conſtantly admitted as witneſſes 44
Oaths are not of the chriſtian inſtitution, but as old as the creation 45
If infidels do not believe a God, or rewards and puniſhments hereafter, they ought not to be admitted *ibid.*
The rule of evidence is that ſuch ought to be admitted as the neceſſity of the caſe will allow of, but though admitted, muſt be left to the perſons

who try the cause to give what credit to it they please *Page* 45

As the witnesses here do not believe the christian oath, they must out of necessity be allowed to swear according to their own notion of an oath 46

Rules of evidence are to be considered as artificial rules, framed by men, for convenience in courts of justice, and founded upon good reason *ibid.*

Hearsay cannot be admitted, nor husband and wife as witnesses against each other, and yet from necessity have been allowed *ibid.*

The rule as to admitting evidence in foreign and [illegible] matters differs from other instances in courts of justice 47

Lord Chief Justice *Lee* of opinion, that if the [illegible] of a foreign contract made in the presence of a public notary was in question here, his testimony would be allowed to authenticate the contract *ibid.*

Cases determined [illegible] law upon evidence taken from [illegible] of countries 48

The essence of an oath is an appeal to the Supreme Being as the taking him [illegible] of truth, and [illegible] of [illegible], [illegible] Lord *Coke* [illegible] which [illegible] the word christian into an oath *ibid.*

The outward act [illegible] the oath, for this was always [illegible] of liberty *ibid.*

An absolute necessity the first ground for departing from strict rules of evidence, a presumed necessity the second 49

Courts of law here will give credit to the sentence of a foreign court of admiralty, and take it to be right without examining their proceedings *ibid.*

If a heathen not an alien enemy brings an action, and defendant a bill for an injunction, he shall be admitted to answer according to his own form of an oath 50

Framers of indictments multiply words to no purpose, therefore the old precedents are the best, and by them it appears *supra sanctum dei evangelium* are not necessary words in indictments for perjury *ibid.*

The case of the *East-India* Company and Admiral *Matthews* in the Court of Exchequer mis-stated, for there is no such thing as sending one judge out of a court to the judges of another upon a point of evidence *Page* 50

A bill brought for an account against the representatives of an *East India* Governor, who pleaded that the plaintiff was an alien born, and an alien infidel, and could have no suit here: plea over-ruled, for, being a mere personal demand, the plaintiff may bring a suit in this court 51

Amendment.

In what Case allowed or not.

After publication is past, a plaintiff can not amend without withdrawing his replication 51

Answers, Pleas, and Demurrers

Vide tit. Bill for Discovery 235, 2[illegible].

What shall be a good Plea or [illegible] pleaded.

Lands devised to be sold for payment of debts, bill brought by a creditor of [illegible] [illegible] over her title to lands in [illegible]: she pleads a settlement and jointure, and offers to discover if plaintiff will confirm it, but neither [illegible] out the date nor lands contained in the settlement. The plea over-ruled, for she ought to have set forth both these matters 52

An insurer by his bill suggests the ship was lost fraudulently, and in the charging part mentions, that instead of proper goods there was only *wool* on board, and in the interrogatory part prays defendant may *set out what kind of goods he had on board*; defendant pleads several statutes that make it penal to export wool, in bar to a discovery of all kinds of goods on board; The plea allowed, because no goods, but wool mentioned in the charging part; if there had, defendant must have given some answer to it *ibid.*

A plea may be bad in part, and yet not for the whole 53

Where a defendant pleads a decree of dismission of a former cause for the

ſame matter, in bar of the new bill, if the plaintiff does not apply that it may be referred to a maſter to ſtate whether there is ſuch a decree, but ſets down the cauſe for hearing, he has waived his right of application for ſuch reference, and the court will determine it *Page* 53
The defence proper for a plea muſt be ſuch as reduces the cauſe to a particular point, and from thence creates a bar to the ſuit, and every good defence in equity is not likewiſe good as a plea 54

Appointment, See **Power.**

Apprentice, See **Maſter and Servant.**

Arreſt, Vide tit. **Dureſs.**

Where good though on a Sunday.

Q. If a bankrupt is liable to be arreſted while under ſummons of commiſſioners 54
An arreſt on a *Sunday* by *Lord Chancellor's* tipſtaff under a warrant of the court, for a contempt in diſobeying an order, though inſiſted upon to be illegal, as being contrary to the ſtatute of 29 *Car.* 2. *cap.* 7 *ſect.* 6. intitled, *An act for the better obſervance of the Lord's Day*, determined by *Lord Chancellor*, upon conſideration, to be a lawful arreſt 54
A man may ſurrender himſelf voluntarily to a warrant upon a *Sunday* 57
The order of commitment for a contempt differs from a precept to ſheriffs, for it is that *the Party ſhould ſtand committed*, and if petitioner had been preſent when the order was pronounced, he was inſtantly a priſoner *ibid.*
The warrant here directed to the gaoler to take him, and to carry him to priſon, but in other courts are directed to ſheriffs, and other miniſterial officers, *ibid.*
This is drawn up like eſcape warrants, which may be executed on a *Sunday* *ibid.*
Lord Chief Juſtice *Holt* of opinion, a man might be taken up on a *Sunday*, upon a proceſs of contempt, becauſe in the nature of a breach of the peace, and an exception out of the act of parliament *Page* 58
The court of Common Pleas held that a man might be taken on a *Sunday* upon an attachment for non-performance of an award; a contempt for non-performance of an order of this court, equally a breach of the peace 58

Aſſets, See **Heir and Anceſtor, Executors and Adminiſtrators.**

A. gives ſeveral legacies, and makes *B.* his executor and reſiduary legatee; *B.* receives all the aſſets, and buys lands with the money, and alſo the equity of redemption of another eſtate, on which *A.* had a mortgage, and dies: Bill brought by legatees to be paid their legacies out of *B.*'s real and perſonal eſtate. The court directed that the aſſets laid out in the purchaſes ſhould be taken as teſtator's perſonal eſtate. The equity of redemption held to be aſſets 59
Where money ariſing from the ſale of lands, &c. ſhall or ſhall not be legal aſſets 420 note 1

Award and Arbitrament.

A. by articles previous to his marriage agrees to veſt 1000 *l.* in truſtees, the intereſt thereof to be received by *A.* and his wife, during their lives, and afterwards to be divided between their iſſue, and gives the truſtees a warrant of attorney to confeſs a judgment for that ſum which was entered up; *A.* enters into partnerſhip with *B.* afterwards, and being indebted to the partnerſhip eſtate in more than his intereſt in that eſtate, they ſubmit the difference between them to arbitration, and part of the ſtock in trade is awarded to be lodged in the hands of a third perſon, any part to be delivered to either of the parties, on making it appear any bond or other debt due from the partnerſhip had been paid by either, the quantity to be delivered in proportion to the money paid: the truſtees in the marriage articles bring a *ſcire facias* on the judgment confeſſed to them, and take a moiety

a moiety of the deposited stock in execution as the property of *A.* 60
Bill by the partnership creditors to set aside the execution, and to have the moiety of the stock so seized appropriated to payment of their debts, insisting it was specifically bound by the award and the execution of it, *the plaintiffs* being no parties to the submission, nor privy at all to the transaction, nor under an obligation of abiding by the award, ought not to have the benefit of it, and therefore bill dismissed *Page* 61
A bill will not lie to carry an award into execution where the parties to the submission do not acquiesce in it, nor agree afterwards to have it executed, but must be inforced at law 62
A. and his wife covenant in articles before marriage, in consideration of 2000*l.* his wife's portion, to release all the right that might accrue to them out of her father's personal estate by the custom of *London* 63
The husband is bound by his covenant, and though the wife was under age, yet it is a matter that accrues to him in the right of his wife, and he may release it, and his release will bind her 64
An old law in the city, called *Jac.*'s law, whereby a husband is authorized to agree with the father for the wife, though she is under age *ibid.*
The husband's covenanting to release is an extinguishment of the wife's right to the orphanage part, and if so, leaves the estate of the father as if it had never been charged, and therefore must be considered as a part of his general personal estate, and not go wholly to the father's executor as a part of the dead man's share *ibid.*
Where arbitrators are deceived, or where they make their award clandestinely, without hearing each party, a court of justice will interpose and avoid such award *ibid.*
Though a bill in Chancery cannot be received in evidence at law, yet in this court it may be read, and has been often allowed as evidence 65
An arbitration bond is a debt at law 241

Bankrupt.

Concerning the Commission and Commissioners.

A Commission of bankruptcy is an action and execution in the first place *Page* 67
Separate creditors may come under a joint commission and prove their debts *ibid.*
If a bankrupt has his certificate under a joint commission it discharges him from all debts separate as well as joint *ibid.*
Commissioners have no power to admit separate creditors to prove debts without the sanction of the court 68
Commissioners upon the day for chusing assignees are not to examine critically into the debt, but to admit creditors for what they swear is due to them, as they are liable to an account afterwards 68
A creditor by bond, and an open account likewise, shall be admitted to prove the bond, because the commissioners may still take the account, and upon a dividend he shall be intitled to no more than is due to him on balance 70
A creditor in all cases of open accounts ought not to be excluded till the account is taken, because then the choice of assignees might arise from a minor part in value of the creditors, but still if commissioners have just grounds to doubt the debt, they do right to admit it only as a claim *ibid.*
The granting caveats against commissioners of bankrupts very inconvenient, as it may give persons against whom commissions are to be taken out an opportunity of making away with their effects 72
A note given before an act of bankruptcy, though indorsed after, is a debt, upon which the indorsee may take out a commission of bankruptcy against the drawer 73

Rule as to the Certificate of a Bankrupt.

See *Twiss* v. *Massey* under *Concerning the Commission and Commissioners.*

The certificate of a bankrupt being stayed upon the petition of a claimant under

under the commission, who suggested fraud and collusion between the bankrupt and his son: at a meeting of the commissioners to examine into this matter, several new creditors came in and proved their debts, but as they did not join in a petition to set aside the certificate as fraudently obtained the court would not delay the allowance thereof, but left the claimant to bring a bill if he thought proper *Page* 73

Where a bankrupt's estate is sufficient to pay all, with a large surplus, creditors, whose debts carried interest, shall be allowed interest for their respective debts, from the time the computation of it was stopped by the commissioners; but such as are creditors by bond not beyond their penalties 75

Where bills are brought to settle the demands of creditors in bankrupt cases, the rule of determination is the same as if heard upon petition 76

The proof of a debt before commissioners, unless an objection made in a reasonable time, is conclusive, and the bankrupt's representatives are bound by it 77

A certificate in the life-time of the bankrupt, though not confirmed by *Lord Chancellor* until after his death, is good; for the operative force of it arises from the consent of the creditors, and when confirmed has its effect from the beginning *ibid.*

The statute of the 13 *Eliz.* gives commissioners an equitable as well as legal jurisdiction, and so construed ever since, and on petitions before the Chancellor, he proceeds as in causes by bill upon the rules of equity *ibid.*

A certificate discharges the person of the bankrupt, and his estate subsequently accrued, but not the estate in the hands of the assignees 79

Where there is mutual credit between a bankrupt and a creditor, the commissioners ought to stop interest on both sides at the time of the bankruptcy, or compute interest on both sides till the settling the account 80

Where 4 parts in 5 in number and value of the creditors have signed the certificate, the court will not stay it on the petition of persons whose demands on the bankrupt's estate depend upon an account to be taken, and where they do not swear to a balance in their favour *Page* 81

The bankrupt acts are not adopted in *Ireland* 82

Where a person carries on a trade in dominions belonging to the crown of *Great Britain*, and comes over to *England*, a commission may be taken out by a creditor, in the place where he then happens to be, as he has traded to this kingdom, and contracted debts here *ibid.*

Certificates are matters of judgment, and a *mandamus* would not lie to compel an allowance, for it is discretionary in commissioners first, and in the *Lord Chancellor* afterwards 82

Where a bankrupt is a trader in *Ireland* signing his certificate in three months after the commission issues is too precipitate, and *Lord Chancellor* stopped it on account *ibid.*

Unless a person proves a debt, or shews a reasonable ground for a claim, he is not within the rule for assenting or dissenting to a certificate 83

The allowance of a bankrupt's certificate will not discharge his sureties, but they may be proceeded against notwithstanding such allowance 84

An application by a creditor to stay the bankrupt's certificate: the commission was taken out the 10th of *September*, and the certificate sign d the 20th of *November* following: such hasty proceeding is contrary to the intention of the statutes of bankruptcy, which were made in favour of creditors, but are too often abused for the service of insolvent persons; the certificate therefore ordered to be staid *ibid.*

A person who has a debt in his own right, and another as executor cannot sign a certificate in two distinct capacities 85

The clause in the 5 *Geo.* 2. in which a bankrupt is excepted from the benefit of this act, who hath upon marriage of any of his children given above the value of 100 *l.* unless he hath sufficient to satisfy all his creditors, must be construed strictly, and not extended further than children of a bankrupt 86

The certificate being signed upon the same day with the bankrupt's last

examination,

examination, and two thirds of the creditors living in *Grenfey*, the allowance of the certificate stayed for these reasons *Page* 86

Formerly the judges had the cognizance of certificates, but being found inconvenient the Great Seal has taken it to itself 87

Rule as to Assignees.

The rule that trustees shall not be accountable for losses, which happen from necessary acts, does not extend to their agents *ibid.*

If an assignee under a commission of bankruptcy employs an agent to receive money, and he imbezils it, the assignee will be liable to make it good to the creditors, unless he consulted the body of the creditors in the appointment of the agent 88

All the court can do in a summary way under a commission of bankruptcy, is in transactions between the creditors and assignees, but the court will not on petition determine on private agreements between assignees independent of the creditors *ibid.*

Where assignees of bankrupts die, or are discharged, and others are put in their room, they cannot revive, but must bring a supplemental bill to intitle themselves to the benefit of proceedings in a former suit *ibid.*

A purchaser pendente lite, on filing a supplemental bill, is liable to all the costs from the beginning to the end of the suit 89

Where an assignee dies before he has accounted for what he has received, and leaves no personal assets, the creditors have a lien upon his real estate *ibid.*

Assignees are mere trustees, and each separately answerable only for what they receive *ibid.*

Where a joint obligor dies, his representative shall be charged *pari passu* with the surviving obligor in the payment of the bond 90

Proper to insert the words *jointly and severally* in assignments under commissions of bankrupts *ibid.*

Where assignees do not divide a bankrupt's effects in a proper time, but are making a private advantage to themselves, the court will charge them with interest *Page* 90

An assignee cannot stop a person's share in a dividend, on account of his own private debt owing to him from that person *ibid.*

Creditors cannot give a general power to assignees to prosecute suits, or submit matters to arbitration at their own discretion, but there must be a distinct meeting of creditors, upon a notice given in the *London Gazette*, to consider of each particular suit or case for arbitration 91

Commissioners may order a dividend to be advertized, if they think it proper for assignees to make one 91

The court will not set aside the choice of assignees because some of the creditors live beyond sea, and had no opportunity of voting *ibid.*

Assignees ought not to be removed, unless it is shewn that they are not persons of substance or integrity 92

No precedent to be found of an order for creditors to proceed to a second choice upon a bare suggestion that some live remote from *London*, or are out of *England*. *ibid.*

B. in 1718, after marriage, conveys his real estate to trustees, in consideration of 5 *s.* and other valuable considerations, in trust for himself for life, to his wife for life, then to his eldest son if he survived his father and mother, and so to the next son, *&c. B.* afterwards became bankrupt: this is a conveyance which falls directly within the clause of 1 *Jac.* 1 *cap.* 15 and therefore trustees decreed to convey to the plaintiffs the assignees under the commission against *B.* 93

Necessary to prove on the statute of 13 *Eliz.* that, at the making of the settlement, the person conveying was indebted at the time of the execution of the deed *ibid.*

Upon the statute of 27 *Eliz.* subsequent purchasers shall prevail to set aside a settlement that is voluntary, and not for a valuable consideration 94

Assignees stand in the place of a bankrupt, and are bound by all acts fairly done by him *ibid.*

The consideration in a deed of 5 *s.* and other valuable considerations does not oblige

oblige the court to hold it to be for a valuable consideration *Page* 94
An assignee under a commission of bankruptcy must surrender a copyhold to the purchaser notwithstanding the lord may exact two fines, for no person can make a common-law conveyance of a copyhold 95
An assignee under a commission of bankruptcy of a copyhold estate is a vendee within the statute of 13 *Eliz. cap.* 7. and not the purchaser from the assignee of such estate 96
Commissioners ought to accept copyholds out of a deed of assignment of the bankrupt's estate because it will save the expence of two fines to the lord, as they may convey to the purchaser thereof in the first instance by bargain and sale 96
No prejudice will accrue to creditors by leaving out copyhold estates in a temporary assignment, for an extent of the crown will not affect it *ibid.*
Several things in the bankrupt laws which want reformation *ibid.*
Where an assignee becomes a bankrupt, and is removed, his assignees as well as himself must join with the commissioners in executing an assignment to the new assignees 97

Joint and separate Commission.

Where there is a joint commission against two partners each must be found bankrupt, and though one die, the commission may go on, but if one be dead at the time of issuing the commission, it abates *ibid.*
Where there is both a joint and separate commission, a creditor under the joint, may come under the separate, and assent, or dissent to the certificate *ibid.*

See *Commission and Commissioners.*

Separate creditors may come in under a joint commission and prove their debts, but where there are two persons who have been partners, and yet the commissions are taken out against them as separate traders. *there* creditors upon the joint estate cannot prove their debts under each commission 98
A joint commission of bankruptcy taken out against two persons, and a separate commission against one, a creditor upon their joint and several bond is not intitled to have a full satisfaction out of both estates at the same time, but must make his election upon which of the estates he will come in the first place, and such creditor shall have time to look into the accounts of the bankrupt's joint and separate estate, before he makes his election *Page* 98
Doubtful whether a creditor under a separate commission against *A.* and debtor to a joint commission against *A.* and *B.* can set off the debt he owes the latter by his demand against the former 100

Rule as to his Executor, or where he is one himself.

Executor, of a bankrupt unless the commission against his testator be superseded, cannot take out one for a debt due to the testator *ibid.*
Petitioning creditor shall pay costs of *supersedeas* only, where a commission is superseded merely for a defect in form 101
Where assignees have possessed themselves of effects which belonged to the bankrupt as an executor only, the court upon an application of the testator's creditors will for the securing his effects, appoint a receiver, to whom the assignees shall account for so much as they have got in of the testator's estate *ibid.*
An executor selling off the stock of his testator, though it consists of wines, and he buys some others to mix with and fine them, will not make him a bankrupt; otherwise if he buy wines intire, and sells them to his customers intire 102
Where a person against whom a commission is taken out has surrendered himself, and acquiesced a year and half since the taking out thereof, the court will not direct an issue to try the bankruptcy, but leave him to an action at law *ibid.*

Rule as to Landlords.

Where a bankrupt's goods are sold by an assignee, a landlord can only come in for

for his rent *pro ratâ*, with the other creditors. Page 102
A mortgagee who has paid the arrear of rent on a bankrupt's estate, unless he has an order to stand in the landlord's place, shall not be preferred to the creditors under the commission 103
If the landlord of a bankrupt suffers his assignees to sell off his goods, he is not intitled to his whole rent, but must come in *pro ratâ* with other creditors under the commission *ibid.*
A landlord may distrain for his whole rent, even after assignment or sale by the assignees, if the goods are not removed 103
An assignment has a retrospect so as to avoid any mesne acts done by the bankrupt *ibid.*
Commission against *A.* who owed *B.* twelve years rent; *B.* proves his debt under the commission; the assignees sell the whole goods of *A.* to the petitioner, who lives in *A.*'s house; *B.* three years after proving his debt, distrains upon these goods as being still upon the premisses. The vendee of the goods is intitled to them; and the proceedings of *B.* upon his replevin restrained and confined to his remedy under the commission 104
Notwithstanding a commission, and a messenger is in possession of the goods, the landlord may distrain for rent, even after an assignment, if the goods are on the premisses *ibid.*
A creditor after he has received a dividend under a commission, will be allowed to bring an action at law for his debt upon refunding that dividend 105

Rule as to Compositions.

A. being upon an agreement for a composition, gives one of his creditors who would not consent to it otherwise, a bond for the residue over and above his composition, such a contract, though not void by the express words of 5 *Geo.* 2. seems to be within the reason and design of this act *ibid.*

Rule as to Creditors.

A bond creditor, to whom the partners were jointly and severally bound, may make his election to come against the joint or separate estate, but not against both, except for the deficiency; and after the other creditors are paid P. 106
Where a meeting of creditors is properly advertised, and some do not think proper to come, the majority in value who are present have a right to bind those who are absent *ibid.*
Where drawer and indorser of notes are both become bankrupts, and the creditors have received a dividend of 6*s.* under the commission against the indorser, they can only prove the remaining 14*s.* under the commission against the drawer 107

See *Rule as to Assignees* 91.

See *Commission and Commissioners* 67.

B. a creditor under a commission, being indebted to *K.* in 79*l.* draws on the assignee for that sum, payable to *K.* or order, out of *B.*'s share of the dividend to be made; the assignee accepts it by parol, but, before any dividend, becomes a bankrupt himself. *K.* is intitled to the whole 79*l.* and is not obliged to come in *pro ratâ* only under the commission against the assignee 108
Where a bankrupt is in execution for one debt, and the judgment creditor has another against him of a distinct nature he may prove *this* under the commission notwithstanding he refuses to waive his execution upon the other 109
The petitioner creditor of a bankrupt who gave him besides bills of exchange on merchants in *Holland*, that made themselves liable by acceptance *ibid.*
An obligee may have several actions against each obligor, but shall not levy more than one satisfaction for his debt 110
A creditor is intitled to come under a commission of bankrupt against all the obligors, drawers of notes, &c. till he is compleatly satisfied *ibid.*
The petitioner was admitted under the commission for his whole debt, and before a dividend receives 2*s.* and 6*d.* in the pound under a composition of the acceptors of the bills *ibid.*
The assignees insist, he shall be paid a dividend on the sum left only, after deducting the 2*s.* 6*d.* But as the composition was not paid till after the debt

debt proved, he shall receive a dividend on the whole sum *Page* 110

Cuff had been for several years a collector of the land tax for the parish of St *Dunstan*'s in the *West*, and at the issuing of the commission owed upon the balance 928 *l.* 11 *s.* to the chamberlain of *London* 111

An inhabitant of the parish admitted a creditor by *Lord Chancellor*, and allowed to prove for himself and the rest of the parishioners *ibid.*

Where a person stays till a bankrupt and the assignees are dead, and fifteen years after the date of the commission applies to be admitted a creditor, the court on these circumstances, and in consideration of the length of time will, dismiss the petition *ibid.*

Contingent Debts.

A husband by articles previous to marriage covenants to leave his wife 600*l* in case she survives him, he becomes a bankrupt and dies before any dividend made; the wife, as the law now stands, cannot be admitted a creditor under a commission against the husband 115

A bond payable at installments, the obligee, upon a breach of payment at the first installment, gets judgment on the whole penalty; on payment of the money due and costs, even a court of law will act equitably, and relieve the obligor 118

The case *ex parte Criswell*, &c. was an *obiter* opinion of lord *King*'s only, and not the case in judgment *ibid.*

A. a debtor to a bankrupt, before his bankruptcy and creditor to him upon a contingency that takes place after the bankruptcy, shall not be at liberty to set off under the clause relating to mutual credit 119

B. M. in pursuance of articles before marriage with the petitioner, executed a bond to *T. M.* and *W. R.* trustees under the articles, in the penalty of 1000*l* conditioned to be void if the heirs, &c. of *B. M.* should pay to *T. M.* and *W. R.* 500*l.* within three months next after the death of *B. M.* for the use of the petitioner, or in case she should not survive, to the use of her child or children, if any: A commission of bankruptcy issued against *B. M.* who dies on the 1st of *April* 1749: on the 28th of the same month a dividend is made of 9*s.* in the pound: the petitioner prayed to be paid a proportionable dividend: assignees being served with notice, and no counsel attending for them, directed she should be admitted a creditor, and receive a dividend of 9*s.* in the pound, *not being opposed* *Page* 120

A judgment would have made it an immediate debt, and she would have been intitled to have come in as a claimant before her husband's death, and the assignees must then have retained sufficient on a dividend day to answer a proportionable dividend to the petitioner when the event happened 121

Lord Chancellor *King*'s being an *obiter* opinion as to a wife's *being admitted to a dividend*, and Lord *Talbot* doubting of it, and the present Chancellor in a case *ex parte Groome, December* 1741, refusing to admit such a person creditor, his Lordship would not suffer the secretary to draw up the order pronounced at a former day of petitions, though not defended, but recommended it to the assignees to compromise it with the petitioner *ibid.*

The petitioner's husband before marriage gave her father a bond in the penalty of 600*l* conditioned for the payment of 300*l.* to her in case she survived him: he has a commission of bankruptcy taken out against him, and dies in ten days after 113

The court thinking it a doubtful case, whether she should or should not be admitted a creditor, *did not give an absolute opinion*, but on assignees consenting, she should come under the commission for 150*l.* ordered her a dividend accordingly *ibid.*

The statute of 7 *Geo.* 1 *cap* 31 extends only to creditors at a future day *certain* and not to debts on mere *contingencies* which have not happened at the time of the act of bankruptcy committed *ibid.*

All the cases since *Tully* v *Sparks*, 2 *Ld. Raym* 546 have been determined against a contingent interest 114

Rule as to Drawers and Indorsers of Bills of Exchange, &c.

W. draws bills of exchange on *H* who had no effects of *W.* in his hands, they are

transmitted to *R.* and Company, and indorsed over by them to several persons; the assignees of *R.* and Company admitted as creditors under *W.*'s commission, for so much as they have paid to the indorsees of *W.*'s bills of exchange under *R.* and company's commission *Page* 122

A. draws a bill on *B.* who has effects of *A.*'s in his hands, afterwards it is negotiated and indorsed over, this will not make the indorsers only in nature of sureties to *A.* but every indorser will be considered as a new original drawer 124

D. being indebted to *M. K.* in 71 *l.* gave him the following note; *I promise to pay to* M K. *the sum of* 71 *l. Witness my hand*, Aug. 26th, 1734. *E. D. M. K.* being indebted to *B.* in 92 *l.* 19 *s.* delivers *D.*'s note to him, that he might receive the money in part of his debt who gave the following receipt, *Received 20th* Dec. 1734, *a bill for* 71 *l. which when paid, will be on account per* Thomas Byas. *M. K.* becomes a bankrupt, but not having indorsed or assigned the note to *B.* the assignees apply to *D.*'s solicitor, and receive of him the 71 *l.* The assignees of *K.*'s estate, considered as trustees for the petitioner *with respect to the sum of* 71 *l.* *ibid.*

A. gives a note payable to *B.* two months from the date for 100 *l.* *B.* indorses it over to *C.* but allows a discount of 9 *l. per cent.* he proves it under a commission against *A.* for the whole sum, but commissioners, finding out this fact afterwards, stop his dividend; *Lord Chancellor* rejected his petition, and ordered an issue to try whether a bond from the drawer and indorser to *C.* for 100 *l.* paying only 98 *l.* 8 *s.* 6 *d.* was usurious 125

A note given before an act of bankruptcy, though indorsed after, is a debt upon which the indorsee may take out a commission of bankruptcy against the drawer 126

Mr. *Billon* and one *Mitchell* had various transactions together, principally negotiating bills of exchange from 1742 to the 8th of *June* 1743, and on the 18th of *April* 1743 *Mitchell* committed a private act of bankruptcy, the sums paid by *Mitchell* for these transactions to the plaintiff, amounted to 3030 *l.* The assignees bring an action against *Billon*, for so much money had and received to their use, and recovered a verdict against him for 3000 *l.* *Billon* insisted on the trial to have 712 *l.* allowed him, as paid to and for the bankrupt, but being refused, brought a bill for the 712 *l.* *Billon* intitled to have this allowance, and the verdict not conclusive upon him, because it is matter of contract, and of account, and in that respect, a proper subject for the jurisdiction of the court of Chancery *Page* 126 & 127

Drawing and redrawing bills of exchange for large sums, and a continuation of it, is a trafficking in exchange, and a trading which will make a man liable to a commission of bankruptcy, tho' a loss ensues to the bankrupt by so doing 128

G. drew a great number of bills payable to *V.* and *A.* upon *H.* who had no effects of *G.*'s in his hands, but, to do honour to the bills, accepted them notwithstanding. *G.* becomes a bankrupt and *H.* by means of the great sums he paid on account of such acceptance, becomes a bankrupt likewise: The bill-holders prove under both commissions, and receive dividends, but not sufficient to pay 20 *s.* in the pound: *The assignees* of *H.* petition to stand in the place of the *bill-holders, pro tanto*, as *they* had received under *H.*'s commission, against the estate of *G.* Ordered that they should *pro tanto*, as *H.*'s estate had paid on account of his acceptance of the said bills, but not to receive any dividend from *G.*'s estate, till the *bill-holders* had received a full satisfaction for their debts 129 & 130

Watkin of *Bristol* had large dealings with *G.* of *Worcester*, who had *Hatton* for his correspondent in *London*. It was agreed between *G.* and *Hatton*, that the latter should answer all draughts that *Watkin* should draw upon him on account of *G.* *Watkin* draws accordingly on *Hatton* for 4000 *l.* who accepts it, *though he had no effects of G.'s in his hands.* The payee, on the acceptor's non-payment, applies to the drawer who pays it: *Watkin* applies to be admitted a creditor under a commission of bankruptcy against *Hatton*: The agreement between *G.* and *Hatton*, puts the latter to all intents in the same situa-

tion as G. himself, and therefore *tho' he had no effects of G.'s in his hands at the time*, he has, by his agreement, made himself, liable, and *Watkin* has a right to come in as a creditor under the commission against *Hatton* *Page* 131

Where Assignees will be charged with Interest.

See *Rule as to Assignees.* 87.

Rule as to Partnership.

See *Joint and separate Commission.* 97.

See *Rule as to Creditors.* 106.

A separate commission taken out against persons formerly partners, *the joint creditors*, upon an application to the court, were left at liberty to bring their bill, for any demand on account of the partnership against the assignees of the separate estate, who were directed to sell the whole effects, and deposit the money in the bank, but not to make a dividend, until the suit should be determined 132

The joint creditors allowed to prove their debts under the commission in the mean time, without prejudice *ib.*

A commission may issue against one partner for a joint debt, tho' an action cannot be maintained against one without joining the other two partners 133

Though a majority of creditors agree to certify that a commission ought to be superseded at a meeting for that purpose, yet if one creditor says, I shall be able to prove in a few days, do not certify yet, the court will not supersede till such creditor has an opportunity of proving his debt 135

Where there is a principal and surety, and surety pays off the debt, he is intitled to have an assignment of the security to enable him to obtain satisfaction for what he has paid above his own share *ibid.*

H. a silkman, and *F.* a dealer in coals, are partners in both trades, they afterwards dissolve the partnership, and *F.* gives *H.* a release of all demands, and took upon him the payment of the debts due from the coal trade, and *H.* the debts from the silk trade and the respective debts assigned accordingly *Page* 136

H. dies, and a commission of bankruptcy is taken out against *F.* and the messenger attempting to seize the effects of *H.* in the hands of his representative, is opposed and turned out of possession. The assignee petitions, complaining of the force upon the messenger *ibid.*

By the release of *F* to *H* the whole property of the silk trade vested in *H.* and the assignees of *F.* standing in no better light than the bankrupt, the goods of *H* ought not to have been seized under the commission against *F.* and petition dismissed with costs 136 & 137

Formerly, where there were several partners, the custom was to take out separate commissions against each partner, as well as a joint commission; but this being thought a very unreasonable practice, and occasioning great confusion with regard to bankrupts' effects, has been discountenanced, and the court now keep one commission only on foot, and direct distinct accounts to be kept of the several estates 138

Where there is a joint commission, separate creditors ought not to take out a separate one, but apply to be admitted to prove their debts under the joint, as being a means of saving expence to the creditors *ibid.*

Upon an application of joint creditors to be admitted to prove their debts under a separate commission; ordered *provisionally*, that they shall be admitted creditors, and assent or dissent to the bankrupt's certificate, because it would otherwise clear him of the debts of joint creditors, as well as separate *ib.*

Rule as to Costs.

See *Rule as to Assignees*, 87.

See *Rule as to his Executor, or where he is one himself.* 102.

If a whole petition is recited in an affidavit of service, the court will make the

attorney who drew it pay the costs out of his own pocket *Page* 139

See *Rule as to Assignees.* 87.

An issue had been before directed to try the bankruptcy of *G.* and found no bankrupt agreeable to the judges directions. A commission of bankruptcy is a proceeding at law in the first instance, and if costs are given there, it will follow of course in the proceedings before this court *ibid*

Costs accrued by protesting bills before a commission issues may be proved, but no parts of the costs arisen afterwards 140

The Construction of the repealing Clause in the 10th *of Queen* Anne.

The statute of the 10th of Queen *Ann. cap* 15 repeals only that part of the statute of 21 *Jac. cap.* 19. which constitutes a bankrupt, but not the description of the trade or occupation of the person against whom the commission issues 141

A *scrivener* is comprehended in the words *bankers, brokers* and *factors* in the statute of 5 *Geo* 2. *cap.* 30. *sect.* 39. 142

Rule as to Dividends,

See *Rule as to Assignees being charged with Interest.* 132.

See *Drawers and Indorsers of Bills,* &c. 122.

See *Rule as to allowance to Bankrupts.* 207

Commission superseded.

See *Rule as to his Executors, or where he is one himself.* 100.

See *Rule as to Costs.* 138.

See *Rule as to Partnership.* 132.

On superseding a commission, the court may either direct an inquiry before a master of the damages sustained by the bankrupt, or *a quantum damnificatus* upon an issue at law, and after damages are settled, may, for the better recovery thereof, order the bond given by the petitioning creditor to *Lord Chancellor,* to be assigned to the bankrupt *Page* 144

After two dividends, the creditors release *the bankrupt* of all further demands; he petitions to supersede the commission, and for liberty to collect in the debts still due to the estate: The bankrupt admitted to stand in the place of the assignees to get in the remainder of the debts, but *Lord Chancellor* would not supersede the commission for the sake of the bankrupt, as it would intirely defeat his certificate 145

After a commission of bankruptcy has been proceeded upon in the usual manner, and all the creditors have acquiesced in it, and the whole compleatly finished, the court will not supersede it, tho' the act of bankruptcy committed before the petitioning creditor's debt arose was of a doubtful nature *ibid.*

A commission superseded, because it issued against an infant 146

A. treated with *H.* against whom a commission of bankruptcy was awarded, for the purchase of the equity of redemption of his estate in mortgage to *F* 400*l* settled for the purchase. Articles signed, and *A.* pays 251*l.* 1*s.* to clear off the mortgage, and was to pay 150*l.* more on the execution of conveyances: On *H*'s refusing to compleat the purchase, or pay off the mortgagee, *A* brought an action against *H* who was carried to gaol, where he lay two months, and upon this was declared a bankrupt: *H* applies now to supersede the commission, on a suggestion that *A*'s debt is not of such a nature as intitles him to sue out a commission 147

The court doubted whether *A.* could take out a commission on such a contract, saying, the remedy ought to have been a bill for performance of the contract, and no action could be maintained; and it appearing that *A.* since the issuing of the commission, had taken an assignment of the mortgage, he was restrained from proceeding on the commission, for, as standing in the place of the mortgagee, he could hold till redeemed, and likewise compel

pel a performance of the contract, or oblige *A.* to refund the 25 *l.* 1 *s.* *Page* 147

Rule as to Bankrupt's Attendance on Assignees.

The attendance of the bankrupt on the assignees to assist them in making out the accounts of his estate, is confined by the 5th of the present King to the 42 days, or the enlarged time at most; but if the assignees will undertake, for the creditors under the commission, that they shall not arrest him, the court will order him to attend, notwithstanding any risque he may run from his creditors at large 148

Rule as to an Apprentice under a Commission of Bankruptcy.

An apprentice, where his master becomes bankrupt, shall be admitted as a creditor only upon the remaining sum, after deducting for the time he lived with the bankrupt 149

Rule as to discounting of Notes.

See *Rule as to Drawers and Indorsers of Bills of Exchange.*

A person who takes no more for the discount of notes than at the rate of 5 *l.* *per cent. per Ann.* shall prove the whole amount of those notes under a commission of bankruptcy against the drawer, without being obliged to deduct what he received of the indorser for the discount 150

The rule established by commissioners of bankrupts, that *note* creditors cannot prove interest upon them, unless expressed in the body thereof, is a reasonable one, and the court will not break through it 151

Rule as to a petitioning Creditor.

See *Rule as to his Executor, or where he is one himself.*

The clerk of the commission caused the bankrupt to be arrested at the suit of *I.* petitioning creditor and assignee, in the Sheriff's court of *London*, for 80 *l.* and afterwards causes another action to be brought in *B. R.* for the same sum, and kept him in custody till *F.* had an opportunity of arresting him on the King's Bench action, and afterwards charges him with another action at the suit of one *Wass*; bankrupt applies to be discharged from both actions: *I.* and *W.* directed by the court respectively to discharge him out of the custody of the marshal, as the same attorney was concerned in both actions *Page* 152

A petitioning creditor cannot arrest a bankrupt, because a commission is both an action, and an execution in the first instance *ibid.*

A petitioning creditor determines his election by taking out the commission and cannot sue the bankrupt at law, though for a *debt distinct* from what he proved 153

Where persons refuse to prove debts under a commission, the barely being assignees will not determine their election, but they may still sue the bankrupt at law *ibid.*

A petitioning creditor has not the same election as a common creditor; for if he was to elect to proceed at law, it would supersede the commission 154

See *Commission superseded.*

Rule as to Notes where Interest is not expressed.

See *Rule as to discounting of Notes* 150

The Construction of the Statute of 21 Jac. 1. cap. 19. with respect to Bankrupts' possession of Goods after Assignment.

Assignment of a ship at sea for a valuable consideration may be good against assignees of a bankrupt, though no possession is taken thereof, but if of goods at land otherwise 154

Pawnee has only a special property in goods, if not redeemed within the time 156

An owner of hoys mortgages them, and after so doing, is suffered by the mortgagee to use them for three years together, and has money lent him upon the credit of being the owner, they are

are liable to be sold under a commission of bankruptcy *Page* 157
Where a creditor of a bankrupt has received money of him, and an action is brought by the assignees to recover back such money, they must prove such creditor had notice of the bankruptcy when he received the same *ib.*
Where goods are delivered to a creditor after notice of an act of bankruptcy, the proper action for the assignees is trover, because there is a tort in detaining, though he came rightfully to the possession of the goods *ibid.*
Marriage, without a portion, is itself a consideration for an agreement 158
A woman's fortune falling short of the husband's expectations, is no reason for setting aside a marriage agreement 159
The clause in 21 *Jac.* 1 which says, *that all goods in the possession of a bankrupt, whereby he gains a general credit, shall be liable to his creditors,* relates to goods the bankrupt has in his own right only *ibid.*
R. W. and his partner gave a bond to *H.* for 1200 *l.* and the same day by deed assigned to *H* or order, the goods in two ships then at sea, and also 13 bills of lading, and policies of insurance containing the said goods, as a collateral security, the latter indorsed to *H.* the former not: A bill brought by the assignee of *R. W.* become a bankrupt for these goods, insisting that *R. W.* acted as the visible owner of the ship and cargo, being not put into the possession of *H.* and therefore the plaintiff intitled thereto for the benefit of the creditors at large 160
The court of opinion that every thing which could shew a right to the ship and cargo being delivered over to *H. R. W.* could no longer be said to have the order and disposition of them, and therefore not within the meaning of 21 *Jac. cap.* 19. and consequently *H.* has a right to retain the ship and cargo till the principal sum of 1200 *l.* and interest is satisfied 160
A being indebted to *B.* assigns over barges to *B.* who suffers *A.* to keep the possession, this is a fraud on the creditors at large, and the barges may be seized under a commission of bankruptcy taken out afterwards against *A.* 161
Where there is an assignment of an outward bound cargo, it is a compleat contract, though the cargo is not delivered to the assignee *Page* 162
Indorsing bills of sale does not amount to an assignment, unless the goods are directed to be delivered to the assignee *ibid.*
Assignees under commissions of bankruptcy take, subject to all equitable liens against the bankrupt himself *ib.*
Assignment of choses in action for a valuable consideration, are good against creditors under a commission of bankruptcy *ibid.*
If a person advances money upon a conditional sale of goods, and does not insist upon a delivery thereof, he confides in the credit of the vendor, and not on any real or particular security, and ought to come in under a commission of bankruptcy against the vendor, as much as any other person, that places a confidence in the bankrupt, and not on any other security 165
The general view of the provision now in question, is to prevent traders from gaining a delusive credit from a false appearance of their circumstances 183
The statute of 21 *Jac.* 1. *cap.* 19. extends to conditional as well as absolute sales *ibid.*
A share of the partnership trade, &c. mortgaged to a partner, must be delivered, or it is a delusive credit, and falls within the statute of 21 *Jac.* 1. *cap.* 19. *ibid.*
The provisions in 21 *Jac.* 1. *cap.* 19. *sec.* 11. with respect to legal interests, must be followed as to equitable ones; choses in action therefore held to be within the meaning of the act, and are included in the words goods and chattels 184
How far partnership stock is liable to the debts of partners in the first place *ibid.*
Where one partner lends money to another partner generally, and it is not entered in the partnership books, he does not gain a specific lien upon the share of the borrower *ibid.*
A person may set off a debt under the bankrupt acts, though not relative to the mutual credit between him and the bankrupt 185

One *Matthews* sold to one *Flyn* and *Field* two-thirds of 500 barrels of tar, at the rate of 9*s. per* barrel, and the other third he agreed should go, and be consigned to them for sale, at *his* risque, and on his own account, and that he should be at the charge of cartage and porterage, and shipping of the whole. *Page* 185

Matthews accordingly caused the tar to be put into a warehouse or cellar of his own, for the purposes of the agreement; *Flyn* and *Field* at the same time paid *Matthews* in *London* bills 150*l* the amount of two-thirds, and *Matthews* made them out a bill of parcels; *Matthews* afterwards becomes a bankrupt, and the assignees take possession of the tar, as they found it remaining in his warehouse *ibid.*

This was held not to be within the intent of 21 *Jac.* 1. *cap.* 19 which meant to guard against leaving goods *in the possession, order and disposition of bankrupts*, but a mere temporary custody, till *Flyn* and *Field* had an opportunity of shipping it off to *Ireland*, and that they are intitled to two-thirds of the tar *ibid.*

Rule as to Copyholds under a Commission of Bankruptcy.

See *Drury* v. *Man*, under *Rule as to Assignees* 95

Where Assignees are liable to the same Equity with the Bankrupt.

Though the court will favour creditors, yet it must be where they have a superior right to other persons 188

A settlement after marriage good, if it be upon payment of money as a portion, or a new additional sum, or even upon an agreement to pay money, if afterwards paid 190

Where creditors can have no remedy at law, but must come into equity, this court will make them do equity 191

Though in a conveyance by lease and release the lease is missing, yet if a consideration be proved, the release will amount to a covenant to stand seised 191

In the case of voluntary settlements and wills, if there is no declaration of the trust of a term, it results to the donor; otherwise, where it is a settlement for a valuable consideration, and in the nature of a contract for the benefit of a wife, and of the issue *P.* 191

A limitation in a settlement to a husband for life, to trustees to preserve, *&c.* to the wife for life for her jointure, and after the decease of both, to trustees for 99 years, on such trusts as hereafter expressed; and after the determination of that estate, to the first, and every other son in tail: No declaration of the uses of the term. The court always takes agreements of this kind according to the nature of the agreement, and therefore consider it only as a trust term to attend the inheritance, according to the limitations in this settlement *ibid.*

See *Walker* v. *Burrows*, under *Rule as to Assignees* 93

See title *Baron and Feme*, under *Rule as to the possibility of the Wife* 280

A bond given to *A* in trust to secure the payment of an annuity of 40*l.* during the joint lives of Sir *Edward Smith* and petitioner, the bankrupt's wife; he delivers up the bond upon his last examination; she applies to the court, and prays the assignee may deliver the bond to her trustee; and that the arrears of the annuity, and all future payments may be made to her: *Lord Chancellor* ordered it accordingly 192

Where a bond is given to a trustee for the benefit of a wife, and the husband becomes a bankrupt, the assignees cannot bring an action, for by 1 *Jac.* 1. assignees can only have the like remedy to recover a debt, as the bankrupt himself might have had, the word *party* in the act being meant of the bankrupt 193

The *obiter* opinion in *Miles* v. *Williams* and his wife, 1 *Wms.* 255. denied by *Lord Chancellor* to be law 193

What is or is not an Act of Bankruptcy.

Where there is a doubt of the bankruptcy, and the bankrupt is out of the kingdom

kingdom, the court will not supersede the commission upon petition, but send it to trial: But where the bankrupt is at home, the court will send it back to the commissioners, to consider if, on the evidence, they can declare him a bankrupt or not *Page* 193

Absconding to avoid an attachment, upon an award for non delivery of goods pursuant to an award, is not an act of bankruptcy within the statute of *Jac.* 1. *cap.* 15. but it must be a departing from the dwelling-house to avoid the payment of a just debt, and not the delivery of goods, for that is a duty only 196

A commission of bankruptcy taken out against the petitioner, who insists, that, as he is a clergyman, he is not liable to become a bankrupt within the intent of any of the bankrupt statutes: *Lord Chancellor* would not supersede the commission, or direct an issue, but left the petitioner to his action at law *ibid.*

The statute of 21 *H.* 8. will not exempt a clergyman from being a bankrupt, for he cannot take advantage of the breach of one law, to excuse him from the breach of another 199

Smuggling, though contrary to an act of parliament, is still a trading within the meaning of the bankrupt acts, and such persons liable to a commission *ibid.*

A bargain or contract made by a parson, contrary to the statute of 21 *H.* 8. *sec.* 5. is void, as to himself only, and he alone is liable to the penalty of the act *ibid.*

If a bankrupt has an objection to a question, he must demur to the interrogatories, and the court will judge of it, upon a petition; or if he refuses to answer any question, and the commissioners commit him, and the delinquent brings an *habeas corpus*, the question must be set forth particularly in the return to the *habeas corpus*, that the judges may judge whether it was lawful or not 200

Ecclesiastical estates may be taken in execution, and upon a sequestration likewise, and the method which is taken in executions and sequestrations may be followed upon a commission of bankruptcy 200

A peer or a member of the house of commons, if they will trade, are liable to a commission of bankruptcy, otherwise as to infants *Page* 201

A person's denying himself to a creditor who calls at eleven o'clock at night, is no act of bankruptcy, for it cannot be said to be done *with an intent to defraud* his creditors, which is the ingredient the acts of parliament require to make a man a bankrupt *ibid.*

Rule as to Sales before Commissioners.

Advertisements in cases of sales before commissioners of bankrupts should not be general only, for a meeting, in order to sell a bankrupt's estate, but ought to name the hour as *masters* do, and after the time expired, if commissioners are not gone, should admit a better bidder, in order to give creditors as great satisfaction for their loss as possible 202

Rule as to Examinations taken before Commissioners.

An order had been obtained to read *inter alia* the examinations of *Margaret Lingood*, taken before the commissioners under *Thomas Lingood's* bankruptcy. They cannot be read, unless proved in the cause that there were such examinations taken before the commissioners; for the proceedings in a commission of bankruptcy against *Thomas* are, as to *Margaret*, *res inter alios acta* 203

A will cannot be proved by an examination of witnesses *vivâ voce*, for the defendant has a right to a cross examination of plaintiff's witnesses *ibid.*

An order to read the proceedings in one cause, in another, must be between the same parties 204

Where one defendant is charged with a fraud, his deposition cannot be read for another, as it may tend to excuse him with regard to his own costs *ibid.*

Lord Chancellor, on a former application, limited the examination of a bankrupt's mother before the commissioners to her son's trading only, but upon a second application refused to restrain the commissioners from asking her any questions, or inquiring into any

circumstances

circumstances which may make him a trader. *Page* 204

His lordship would not make an order that the mother should have counsel upon her examination, because it might be made a precedent in other commissions, and he thought an inconvenience would arise, if allowed in every case 205

A person, instead of attending commissioners, petitioned that he might be examined upon interrogatories, and have a copy thereof, and a month's time to prepare himself, and that the commissioners may be restrained from asking him particular questions in his business of a banker *ibid*

Lord Chancellor will not restrain commissioners in their examinations, as it would be attended with expence, and an inconvenience arise from applications of this kind *ibid*

The bare exchanging of notes with a bankrupt, or giving money for bank notes, cannot affect him as a trader with that bankrupt 206

Who are liable to Bankruptcy.

Pawnbrokers within the statutes of bankrupts, and seem particularly included in the general word *brokers*, in the 39th section of the 5th of *Geo* 2 and so is a public officer, as an exciseman, if he will trade *ibid*

The daughter of a freeman of *London*, if she trades separately from her husband, may be a bankrupt *ibid.*

See *Crisp*, under *Rule as to Partnership.*

See *Meymot*, under *What is or is not an Act of Bankruptcy.*

See *Richardson* v. *Bradshaw*, under *What is a Trading to make a Man a Bankrupt.*

See *Williamson*, under *Rule as to the Certificate of a Bankrupt.*

Rule as to a Bankrupt's Allowance,

A bankrupt is not intitled to his allowance till he has had his certificate 207

A bankrupt's *allowance* under the act of parliament is a vested interest, and, if he dies, will go to his representative *Page* 208

Bankrupts are not intitled to their allowance under the 5th of the present king, till a final dividend is made, for it cannot be seen before, whether they will be intitled to any allowance at all 208

Upon an affidavit of a creditor, that he has not read the *Gazette*, he will be admitted to prove his debt, so as not to disturb a former dividend; nor can commissioners proceed to make a second till he is brought up equal to the creditors under the first 209

The representative of a bankrupt who had, in his life time, divided 10*s.* in the pound, is, as standing in his place, intitled to the allowance *ibid.*

Rule as to Solicitors in Bankrupt Cases.

The court cannot upon petition, make the clerk of the commission pay costs of suit, for not attending to give evidence at a trial, by reason of which the bankrupt was acquitted, for the remedy lies at law *ibid.*

Where a solicitor carries on suits for an assignee, without the authority of the majority in value of the creditors, the estate of the bankrupt is not liable to his bill for such suits 210

Rule as to the Sale of Offices under a Commission of Bankruptcy.

One *Richardson*, in 1746, purchased the office of the under marshal of the city of *London* for 900 *l.* a salary annexed to it of 60 *l.* half yearly, and a freedom of the said city, worth annually 25 *l.* his effects under commission of bankruptcy, not amounting to 5 *s.* in the pound; the assignees applied to the Lord Mayor and court of aldermen for liberty to sell the bankrupt's office, but he being present in court, and refusing to consent, they declared that they could not alienate it without his consent 210

An application to the court here, that the office may be forthwith sold; and that the

the lord mayor, *&c.* may be indemnified in accepting such alienation on the assignees paying the usual alienation fine: *Lord Chancellor* of opinion, that assignees might, by anticipation, sell this office of under marshal, and that it is not within the statute of *Edward* 6. as it doth not concern the administration of justice *Page* 210
The office of serjeant at mace is not saleable, as it concerns the execution of justice: The same as to a sworn clerk in the six clerks office 212
The office of under marshal is clearly within the description of the 34 & 35 *Hen.* 8. *cap.* 4. and 13 *Eliz. cap.* 7. *ibid.*
An office *quam diu se bene gesserit*, is an office for life 213
Where a bankrupt is an executor and residuary legatee, and has paid the debts, and particular legacies out of part of the assets, if he refuses to collect in the rest, notwithstanding the assignees have not the legal interest vested in them, the court would assist them to get in the remainder, in the name of the executor *ibid.*
If an officer of the army should become a bankrupt, the court would lay their hands upon his salary, for the benefit of his creditors 214
A bankrupt, being under marshal of the city of *London*, and refusing to surrender his office, the assignees obtained an order for disposing of the office. *B.* agrees with the assignees for the purchase of the office at 850 *l.* and on the 17th of *October*, 1749. *B.* was presented to the court of lord mayor, *&c.* who approved of him, and were ready to take the bankrupt's surrender, but he refusing, was ordered by *Lord Chancellor* to be committed for his contempt, and thereupon absconded 215
An application to the court to order the court of lord mayor, *&c.* to admit *B.* in the room of the bankrupt. *Lord Chancellor* would not make an order upon the lord mayor, *&c.* to admit *B.* as i was intirely discretionary in them but recommended it to the lord mayor, *&c.* upon the bankrupt's non-attendance, by which his office was forfeited, to dismiss him, and admit *B.* 215
Where the legal interest of a copyhold is in one, and the equitable interest in another, the court can order the trustee to surrender, though *cestui que trust* refuses *Page* 215

What shall or shall not be said to be a Bankrupt's Estate,

See *Brown* v. *Heathcote*, under *The Construction of the Statute of* 21 *Jac.* 1. cap. 19. *with respect to Bankrupt's Possession of Goods after Assignment.*

See *Flyn and Field*, under the same Division.

Where there is a Trust for a Bankrupt's Wife,

See *Greenaway*. See *Groeme*. See *Mitchell*, under *Contingent Debts.*

See *Walker* v. *Burroughs*, under *Rule as to Assignees,*

See *Grey* v. *Kentish*, title *Baron and Feme* under *Rule as to a Possibility of the Wife.*

What is a Trading to make a Man a Bankrupt,

See *Highmore* v. *Molloy*, and *Carrington*, under *Who are liable to Bankruptcy,*

See *Meymot*, under *What is, or is not, an Act of Bankruptcy,*

See *Richardson* v. *Bradshaw & al'*, under *Rule as to Drawers and Indorsers of Bills*, &c.

Bankers having taken upon them to act as scriveners, made it necessary for the legislature in the 5th of *Geo.* 2. to add bankers, as being liable to commissions of bankruptcy 218
A person acting as a banker will be considered as one though he does not keep an open shop 218
A commission of bankruptcy is as much *ex debito justitiæ* as a writ, and no instance where the court supersedes it, without

without directing an issue; unless it appears to be taken out fraudulently or vexatiously Page 218

Rule as to Acts of Parliament relating to Bankrupts.

See *Burchell*, under *The Construction of the repealing Clause of the 10th of Queen Anne.*

See *Lingwood*, under Division, *Rule as to a Certificate from Commissioners to a Judge.*

See *Walker* v. *Burrows*, under *Rule as to Assignees.*

What is, or is not, an Election to abide under a Commission.

An assignee, upon refunding what he had received under two dividends, allowed to make his election to proceed at law against the bankrupt 219

The old laws considered bankrupts as fraudulent insolvents, but the more modern as unfortunate ones, and upon these late statutes have the applications been made to compel creditors who proceeded in a double way to make their election *ibid.*

The reason why such creditor who elects to proceed at law, shall still be allowed to assent or dissent to the bankrupt's certificate, is to make the remedy against the person effectual 220

See *Ward*, See *Lewes*, under *Rule as to a petitioning Creditor.*

Notwithstanding a creditor under a commission of bankruptcy elects to proceed at law, he may still assent or dissent to the certificate *ibid.*

Where a person chuses himself an assignee, it is doubtful whether this is not making an election to proceed under the commission; but on his electing in court to proceed at law, his lordship made an order that he should be discharged as a creditor under the commission 221

Rule as to Prosecutions against a Bankrupt for Felony in not surrendering himself.

One *Wood* applies for an order upon commissioners, to admit him a creditor for 21*l.* upon a note, and that the clerk of the commission may be directed to attend at the *Old Bailey*, with the proceedings upon a prosecution against the bankrupt for felony, in not surrendering himself according to the directions of the act of parliament Page 221

As *Wood* has not yet proved his debt, if not made out to the satisfaction of the commissioners, it may be rejected; and *Lord Chancellor* said, that notwithstanding such a prosecution may be carried on by a person who is not a creditor, yet, by the words of the act of parliament, it looked as if the legislature intended there should be a concurrence of the creditors under the commission; and that as this is a penal law, a court of equity will not lend its aid to such a prosecution, by ordering the clerk to attend with the proceedings at the *Old Bailey*, and therefore he would not grant the petition *ibid.*

Where a bankrupt did not surrender himself in due time, if there did not appear to be any intention of defrauding his creditors, *Lord Macclesfield*, in several instances, superseded the commission in order to prevent *such* a prosecution 222

Rule as to contingent Creditors in respect to Dividends.

See *Groome*, See *Michell*, under *Contingent Debts.*

Rule as to mutual Debts and Credits.

See *Bromley* v. *Goodere*, under *Rule as to the Certificate of a Bankrupt.*

See *Groome*, under *Contingent Debts.*

A packer may retain goods till he is paid the price of packing, and if he has another debt due to him from the same person, the goods shall not be taken from him till he is paid the whole, notwithstanding the debtor is become a bankrupt 228

There have been many cases to which the clause relating to mutual credit has been extended, where neither an action of account would lye, nor could the court of chancery decree one 229

Mutual

Mutual credit is not confined to pecuniary demands only, but if a man has goods in his hands belonging to a debtor, it shall be considered as such *Page* 229

See *Billon* v. *Hide*, under *Rule as to Drawers and Indorsers of Bills*, &c.

A creditor against the bankrupt for 100*l.* and 10*l.* and a debtor to him upon bond for 340*l.* payable on the fourth of *March* 1756. with lawful interest, applies that he may set off his demand of 110*l.* against the principal and interest due on the bond as far as it will go, and not be obliged to prove his debt under the commission, and take a dividend upon it only 230

This is not in strictness a mutual debt, and yet it is a mutual credit, for the bankrupt gives a credit to the petitioner in consideration of the bond, though payable at a future day, and he gives the bankrupt credit for the debt he owes him upon simple contract, and therefore within the equity of 5 *Geo.* 2. An account directed by the court to be taken between the petitioner and the bankrupt, and the balance only to be paid to the assignees *ibid.*

A. lends a sum of money to one partner on his own security, he lends the same to the partnership trade; a joint commission is taken out; *A.* shall not come in as a creditor upon the joint estate of the bankrupts immediately and directly with the rest of the partnership creditors, but by way of circuity he is intitled, as standing in the place of that partner who has paid the money to the use of the partnership trade 223

Where one partner takes out more money from the partnership stock than his share amounted to, the other has a right to come upon the separate estate of that partner *pro tanto* 225

Two partners agree to borrow a sum of money, but one only gives a bond, and the other only a witness to it, the money afterwards entered in the cash book of the partnership; a joint commission taken out, obligee is intitled to be admitted a creditor *ibid.*

Joint creditors, where there are no separate, may exhaust both the joint and separate estate; but where there are both joint and separate creditors, the joint estate shall be applied to the satisfaction of the joint, and the separate estate to the satisfaction of the separate creditors *Page* 227

If there be a surplus of the separate estate, the joint creditors are intitled to it for a bankrupt has no right to any thing till they are fully satisfied 228

Dumas and others, the petitioners, drew bills of exchange on *Julian* and son for 1115*l.* and undertook to make remittances to pay the same, and at the same time acquainted them that these bills were for the proper account of the petitioners, house at *Cadiz*, and desire the *Julians* would keep a distinct account, and distinguish such a new account by the letter *G* being the initial letter of the first partner's name at *Cadiz*: Bills drawn on *Vanneck* and company in *London* to the amount of 1146*l.* 11*s.* 11*d.* remitted accordingly. The *Julians* by letter acknowledge the receipt thereof, and promise petitioners to give credit in their own account, *G.* *Julian* the father died the 25th of *February* last. The day before the son stopped payment, he got two of these remittances discounted for 566*l.* 11*s.* 11*d* 232

On the 20th of *March* a commission of bankruptcy issued against *Julian* the son; *Dumas*, &c. prefer their petition, and pray that the assignees may be directed to deliver to them the several bills of 1146*l* 11*s.* 11*d* or pay the full value. *Lord Chancellor* of opinion the specific bills amounting to 580*l* ought to be delivered by the assignees of *Julian* to the petitioners: As to those which were discounted, the petitioners waived their claim 232

The rule of equality under commissions of bankruptcy extends only to his own estate; otherwise where the matters in question are not relative to his estate in law or equity 233

Where goods consigned to a factor continue in specie, and are found in his hands at the time of his bankruptcy, the principal is intitled to them, and not the creditors at large *ibid.*

Where goods so consigned are sold, and the factors took notes instead of money, the principal intitled to the notes *ibid.*

A person who repairs a ship, has no specifick lien if delivered to the bankrupt; if

if repaired in a foreign port, whilst out upon a voyage, it would have been otherwise. Directed to prove the debt for repairs under the commission *P.* 233

In *March* last a commission of bankruptcy issued against *Mathews*; at the time he became a bankrupt he was indebted to Mr. *Ockenden* in 286*l.* 7*s.* 10*d.* for grinding of corn, who had in his custody 36 loads and 3 bushels of wheat, belonging to the bankrupt, part ground and part grinding, besides a great number of sacks; 16*l.* 5*s.* due to him for grinding the corn, which was in his hands at the time *Mathews* became a bankrupt. The wheat sold by the assignees by agreement between them and *Ockenden*, without prejudice to his claim, who applied by petition to be paid his whole debt out of the money arising by the sale

Lord Chancellor of opinion *Ockenden* had no specifick lien upon the corn and sacks, but a particular one only *pro tanto* as is due for grinding the corn in his hands, and that the loads of wheat, *&c.* belonged to the assignees 235

Where *A.* borrows a sum of money on the pawn of jewels, and further sums afterwards upon his note, the executor of *A.* shall not redeem the jewels, without paying the money due on the notes 236

The case between clothiers and dyers, and clothiers and packers, are different from the present, it being always customary for them to make up their accounts by giving mutual credit; the dyer, for instance, on one hand for work done, and the clothier for his cloth *ibid.*

Courts of equity go no farther than courts of law, in the cases of *a set off* upon the act relating to mutual credit 237

Whether a Bankrupt during his Time of Privilege may be taken by his Bail.

Fescie, a sheriff's officer, and bail for the petitioner, a bankrupt, takes him away during the time of his last examination, and surrenders him in discharge of his bail; he prays to be discharged out of custody, and that *Fescie* may be censured for a contempt of the court. *Lord Chancellor* inclined to think, that the bail's taking the principal coming to a court of justice to be examined, has never been determined to be a contempt of the court, provided they bring him to be examined by that court, and therefore dismissed the petition, but without prejudice to the bankrupt's application to the court of King's Bench *Page* 238

The taking of a bankrupt by his bail is not a contravention of the 5th of the present King, for the force of the clause in that act is *arrests by creditors*; and bail are no creditors till damnified, and therefore not within the description

In the language of the court, the bail are the gaolers of the principal, and upon this notion of law may arrest him on a *Sunday*, as he has his liberty only by the indulgence of the bail 239

Rule as to a Certificate from Commissioners to a Judge.

Lingood being declared a bankrupt, and the three fittings at *Guildhall* advertized, the commissioners upon the examination of witnesses in the intermediate time, finding that he was removing and concealing his effects, summoned him to appear before them the next day from the date of the summons, and on his refusing to come, certified this fact to Mr. Justice *Chapple*, who committed him to *Newgate*, and on the keeper's sending notice thereof to the commissioners, they brought him before them upon their own warrant, and on his refusing to be examined, re-committed him to *Newgate*

Lingood petitioned to be discharged, as being illegally committed; the court of opinion the certificate is pursuant to the powers given to commissioners under the statutes of bankruptcy, and that where they have full evidence of his intention to secrete his effects, they may examine him in the intermediate time, between the declaration of bankruptcy and the fittings at *Guildhall* 240

An arbitration bond is a debt at law, and binds the parties till set aside for corruption or partiality, and is also a suf-

ſufficient debt to ſupport a commiſſion of bankruptcy Page 241
The court will not ſuperſede a commiſſion, or direct an iſſue, upon a general affidavit of the bankrupt that he is not one, for he ought to give a particular anſwer to the facts charged in the depoſitions taken before the commiſſioners, but will leave him to bring a *habeas corpus*, if he thinks proper *ibid.*
Where a perſon apprehends he is aggrieved by a commitment of commiſſioners of bankrupt, the ready way is to ſue out a *habeas corpus*, that the legality thereof may be determined by the judges of the common-law 242
The old acts of parliament conſidered a bankrupt as a criminal, and commiſſioners might at their diſcretion impriſon him; but though the rigour of the law is taken away as to his perſon, the power of examining ſtill remains, and a greater puniſhment is inflicted: If he does not ſurrender, it is *felony* without benefit of clergy *ibid.*
The judge, upon the bare certificate of commiſſioners that a bankrupt refuſed to attend, though the cauſe of ſummoning was not mentioned, is obliged to commit him *ibid*

The Effect of Acquieſcence under a Commiſſion.

See *Deſanthuns*, under *Commiſſion ſuperſeded.*

Rule as to Debts carrying Intereſt under a Commiſſion of Bankruptcy.

See *Marlar*, under *Rule as to diſcounting Notes.*

See *Bromley* v. *Goodere*, under *Rule as to the Certificate.*

On the 10th of *April* 1744 it was referred to a Maſter to ſettle what was due to the creditors under the commiſſion of bankruptcy againſt *Rooke*, and upon payment by the bankrupt, the commiſſion was to be ſuperſeded. The bankrupt offered to pay what was reported due, but the creditors inſiſting upon intereſt likewiſe, from the date of the Maſter's report, the court ſaid that the creditors here are equally intitled (as if they were in the common caſe of a reference to a Maſter in a cauſe, to ſtate what is due for principal and intereſt) to be paid intereſt from the time of the Maſter's report, when the ſums due are liquidated; and the bankrupt was ordered to pay accordingly Page 244

Rule as to Principals and their Factors.

Where agents abroad are in diſburſe for their principal, and, upon being doubtful of his circumſtances, make bills of lading to their own order indorſed in blank, notwithſtanding theſe bills of lading come to the principal's hands, yet if the agent's partner in *London* writes them word that their principal is become bankrupt, and deſires them to ſend the bills of lading, and an order to the captain to deliver the goods to *him*, he may retain them for himſelf and company, againſt the aſſignees under the commiſſion till paid and reimburſed ſo much as the partnerſhip is in advance 245
A factor who ſells goods for a principal, may bring an action in the name of the principal againſt the vendee, and make himſelf a witneſs; or a vendor of goods to a factor, for the uſe of his principal, may maintain an action againſt the principal and the factor be a witneſs for the vendor 248
If goods are delivered to a carrier, &c. to be delivered to *A.* and are loſt by the carrier, &c. the *conſignee* only can bring the action; but if before delivery conſignor hears *A.* is likely to become a bankrupt, or is actually one, and gets the goods back, no action will lie for *A.*'s aſſignees, becauſe while *in tranſitu* they might be countermanded *ibid.*
Notes or bills indorſed in this manner, *pray pay the money to my uſe*, will prevent there being filled up with ſuch an indorſement as paſſes the intereſt. 249
The reaſon the law goes upon in compelling an original proprietor of goods after delivery, to come in as a creditor under a commiſſion, muſt be on account of the general credit a bankrupt has gained by having them in his cuſtody *ibid.*

Rule as to Annuities under Commissions of Bankruptcy.

C. in 1720, gave 300 *l.* for an annuity of 30 *l per ann.* for her life, payable out of a person's estate, who becomes a bankrupt in 1738. The commissioners to settle the value of her life, and directed to be admitted a creditor for such valuation, and the arrears of her annuity, and not for the whole 300 *l.* *Page* 251

Where a bankrupt is under an agreement to pay an annuity, a value must be put upon it, and proved as a debt under the commission *ibid.*

See *Coysgame*, under *Where Assignees are liable to the same Equity with the Bankrupt.*

Rule as to taking out a second Commission.

No second commission can be taken out before a bankrupt has his certificate under the first, for till then nothing can pass to the second, at least of personal estate 252

All future personal estate is affected by the assignment, and every new acquisition will vest in the assignees; but as to future real estate, there must be a new bargain and sale *ibid.*

Assignees may advertize a meeting upon any extraordinary occasion that concerns the creditors, as well as for the particular purposes directed by the acts of parliament 253

Rule as to an open Account under a Commission.

Vide ex parte Simson et al', under the Division, *Concerning the Commission and Commissioners.*

Rule as to Principal and Surety.

See *Crisp*, under *Rule as to Partnership.*

See *Williamson*, under *Rule as to the Certificate.*

Rule as to the Insolvent Debtors' Act.

Stevens, formerly a trader in *Holland*, fails there, upon which there was a *cessio bonorum*: He comes to *England*, and is appointed a governor abroad; he applies to one *Burton* to be his security to the company, and to advance him a sum of money, who agreed to it, provided *Stevens* would give him a bond that should comprize the remainder of an old debt due before the *cessio bonorum*, as well as the further sum advanced, which was done accordingly: *Stevens* afterwards becomes a bankrupt; and the commissioners doubting if *Burton* ought to be admitted a creditor for the whole money, he now petitioned for that purpose *Page* 255

Lord Chancellor, on the circumstances of the case, of opinion, he was intitled to be admitted a creditor for the whole money upon his bond *ibid.*

If a debtor cleared under the insolvent acts afterwards gives a bond for the residue of the old debt, this will be binding upon him 256

If a bankrupt, after his discharge, gets future effects, in point of justice, he ought to make good the deficiency, though no court will compel him *ibid.*

Lord Chancellor seemed to think, if a bankrupt, after his discharge, applies to an old creditor to lend him a new sum of money to carry on his trade, or to be his security for any office, this would be a good consideration for his giving bond for the remainder of the old debt, and the whole may be proved under a second commission *ibid.*

The law of *Holland* with regard to a *cessio bonorum* follows the Digest, and is no discharge of the effects, but only of the person *ibid.*

Where a person discharged by the insolvent debtors' act becomes a bankrupt afterwards, his certificate must be special, and will be allowed only as a discharge of his person, but not of his future estate and effects 257

Rule as to a Bankrupt's future Effects.

See *Proudfoot*, under *Rule as to taking out a second Commission.*

See *Burton*, see *Green*, under *Rule as to the Insolvent Debtors' Act.*

Rule as to a Cessio Bonorum.

See *Burton*, under *Rule as to the Insolvent Debtors' Act.*

Rule as to Deposits under Commissions of Bankruptcy.

A. intitled to navy bills in 1711, deposits them with Sir *Steven Evans* who gave a note to be accountable for them, and in six months afterwards becomes a bankrupt. The representative of *A* petitioned to be admitted before the Master to prove both principal and interest to the time of the decree, as navy bills in their nature carry interest. *Lord Chancellor* held this to be a special deposit, and that a calculation should be made of the value of the whole intire thing deposited, both principal and interest, at the time of the deposit, and that interest ought not to run on as in the case of a simple debt *Page* 259

Rule as to Relation under Commissions of Bankruptcy.

Where the act of bankruptcy is lying in gaol two months, a person shall be deemed a bankrupt from the first day of his surrender to prison by relation, so as to over-reach all intermediate transactions 260

Rule as to an Extent of the Crown.

An extent of the crown is taken out against a surety of a bankrupt, who pays the debt after disputing it some time, and being put to an expence thereby: He shall, notwithstanding he disputed the payment of a just debt, be admitted to prove the expences of such suit under the commission against the principal 262

An extent of the crown is an action and execution in the first instance *ibid.*

A bankrupt though he has conformed in every respect to the acts relating to bankruptcy, cannot be discharged from a commitment under an extent of the crown. *ibid.*

Rule as to Creditors assenting or dissenting to a Certificate.

See *Turner*, under *Joint and Separate Commission.*

See *Lindsey*, under *What is or is not an Election to abide under a Commission.*

See *Williamson*, under *Rule as to a Certificate.*

See *In the Matter of the Simpson's Bankruptcy*, under *Rule as to Partnership.*

Bankruptcy no Abatement.

An order for dissolving an injunction *nisi* will be made absolute, notwithstanding the plaintiff is a bankrupt, unless he shews cause *Page* 263

Bankruptcy is no abatement 264

Arrest upon a Sunday for a Contempt regular.

See *Whitchurch* tit *Arrest*, under *Where good though on a Sunday.*

Baron and Feme.

How far the Husband shall be bound by the Wife's Acts before Marriage.

A Widow had two children by a former husband, and no provision made for them, and these two children had each of them a child, and being in possession in her own right of freehold, copyhold, and leasehold estates, by articles before her second marriage, to which her husband was a party, and by his consent, conveys the whole to trustees, that they may divide the freehold, copyhold, and leasehold, if no issue of the marriage, in moieties, one to the plaintiff her grandson, his heirs and assigns, the other to her grand-daughter in fee, provided if there should be any child or children of the marriage, that child or children to have an equal share of the said estates with the grandson and grandaughter. 265

The husband and wife afterwards mortgage the settled estates, to persons who had notice of the settlement. *ibid.*

The settlement held to be no voluntary agreement, but a binding one, and said by the court, there was no instance where such a limitation has been held fraudulent, and void against subsequent purchasers or creditors, for if it should, no widow on her second marriage would be able to make any certain provision for the issue of a former *Page* 265

How far a Feme Covert shall be bound by the Acts in which she has joined with her Husband.

See *Metcalf* v. *Ives* tit. *Award and Arbitrament*, under *For what Causes set aside.*

Concerning the Wife's Pin money and Paraphernalia.

A. had 300 *l. per annum* pin-money, the husband for several years before his death paid her 200*l* only, but promised her she should have the whole at last 269

If a wife accepts less, or lets her husband receive what she has a right to receive to her separate use, it implies a consent in her to submit to such a method. But where the pin money is paid to her *eo nomine*, her agreement with the husband relating to her separate estate amounts not to a new agreement, and his promise she should have it at last is an undertaking to pay the arrears 269

How far Gifts between Husband and Wife will be supported.

Mary Lucas in her last illness requested of her husband that her wearing apparel, gold watch, pearl necklace, rings, &c. in her possession, and used by her, might be given to her daughter, and put into a friend's hands for her daughter's use, which the husband promised, and after his wife's death gave the said things to his daughter, and made an inventory, and locked them in a strong chest, and gave the key to his wife's friend, and sent the things therein to her for his daughter's use 270

Though the husband afterwards took some of the things into his possession again, that is not sufficient to invalidate the gift, which was perfect by the former act *Page* 270

Gifts between a husband and wife will be supported in this court, though the law does not allow the property to pass 271

Concerning Alimony and Separate Maintenance.

A before, and in consideration of a marriage and a portion with his intended wife, conveys lands to trustees, upon trust to pay 100 *l per ann* to the lady for her separate use She many years after the marriage, upon disputes between her and her husband, leaves him and goes abroad The trustees (there being great arrears of the annuity) bring an ejectment for recovery of the terms, and the husband his bill for an injunction to stay the proceedings in ejectment 272

Lord Chancellor of opinion he could not relieve against the payment of the annuity notwithstanding the husband by his bill offered to receive his wife again, and pay her the annuity if she would live with him *ibid.*

One *Jason*, some few years after his marriage, left his wife and two small children, and went abroad, and did not see her or them in fourteen years; the wife's mother, during this time intrusted her with millinery and other goods, and permitted her to maintain herself and children out of the profits the husband upon his return breaks open the wife's house, and takes away all her goods and produce of the stock so lent as aforesaid 278

A bill (*inter alia*) was brought for the redelivery of the goods: the court held that what the wife has acquired in her husband's absence to subsist herself and family, is her separate property, and not liable to the disposition of the husband; and that what he has forcibly taken he must deliver in specie, and if disposed of, must pay her the value set by the master 278

Rule as to Possibility of the Wife.

Where a particular assignee took with notice of an equity in a wife, and the assignees

signees under a commission of bankruptcy against the husband, take subject to the same equity, the court, as it is her property, will direct it to be transferred to her *Page* 280
A husband cannot in law assign a possibility of the wife, nor a possibility of his own, but the court of chancery will support such an assignment for a valuable consideration *ibid.*

See **Infant**, under *How far favoured in Equity.*

See **Dower and Jointure.**

See **Injunction.**

See **Partition.**

See **Evidence, Witnesses and Proof** 451

Bills of Exchange.

See **Bankrupt**, under *Rule as to Drawers and Indorsers of Bills of Exchange*, and under *Rule as to Principal and Factor.* 122 & 145.

Rule as to an Indorser.

Every indorser is a new drawer 281

Bill.

Bill of Peace to prevent Multiplicity of Suits.

Where there has been a possession of a fishery for a considerable length of time, a person who claims a sole right to it may bring a bill to be quieted in the possession, though he has not established his right at law; and it is no objection, upon a demurrer to such bill, that the defendants have distinct rights, for upon an issue to try the general right they may at law take advantage of their several exemptions and distinct rights 282
A bill of peace, praying an injunction to stay the defendants, who have an interest in the manor of *Tunbridge*, from proceeding at law against the plaintiff for building houses on the manor without leave, and that they may accept of such a compensation as the court shall think reasonable *Page* 282
The court dissolved the injunction, as they cannot be applied to as an arbitrator, nor have any legislative authority, but act in a judicial capacity only 285
A bill of peace may as well be brought by tenants against a lord, as by a lord against tenants *ibid.*

Bills of Discovery, and herein of what Things there shall be a Discovery.

Whilst a suit is depending in the ecclesiastical court for an administration, a bill may be brought here for an account of the personal estate 286
The reason why a bill is allowed to be brought before probate, is, that the ecclesiastical court have no way of securing the effects in the mean time *ibid.*
A devise of personal estate to *A.* and the heirs of her body. *Lord Chancellor* said, it has never been solemnly determined that where money is so entailed the whole shall go to the first taker *ibid.*
Where a bill is for a discovery merely, you cannot move to dismiss it for want of prosecution, but pray an order only on the plaintiff to pay the defendant the costs of the suit to be taxed *ibid.*
One *Farr* gave *Mary Atkins* a bond in the penalty of 1000 *l.* on condition that if he did not marry her within a twelvemonth after date, he would pay her 500*l.* soon after, under pretence of reading it, he took it against her consent, and carried it away with him; whereupon she brought a bill for the delivery of the old bond, or, if cancelled, that he might execute a new one 287
Mary Atkins dying intestate, her mother, as her administratrix, and thereby intitled to the 500 *l.* revived against the defendant *Farr* *ibid.*
The plaintiff's equity, said the court, was the bond's being gone by the default of the defendant, and therefore intitled not only to a discovery here, but relief by payment of the money; and *Farr* was accordingly decreed to pay what was due for the principal sum of 500 *l.* in the condition of the bond, with interest for the same at the rate of

of 4*l. per cent.* from the day of filing the original bill *Page* 287

The court of chancery will not admit a bill of discovery in aid of the jurisdiction of the ecclesiastical court, because they are capable of coming at that discovery themselves 288

Where there is a custom pleaded to a suit in the ecclesiastical court for a church rate, and the plea admitted, they may proceed to try the custom, but if denied it is a ground for a prohibition 289

Where a bill is brought for discovery of concealments of a bankrupt's estate, the court will not allow the defendants to look into their depositions taken by the commissioners before they put in their answers *ibid*

Who are to be Parties to it.

A husband tenant for life, remainder to his wife for life, brings a bill alone for the opinion of the court upon the settlement; objection for want of making the wife a party allowed 290

Bills of Review

On arguing the demurrer to a bill of review, what evidence appears on the face of the decree can be read only, but after demurrer over-ruled, they may read any evidence as at a re-hearing 290

Cross Bills.

Where a defendant in a cross bill, but plaintiff in the original, is in contempt for not putting in an answer; the proper motion is to enlarge publication in the original to a fortnight after the answer is come in to the cross bill 291

Supplemental Bills.

It is a constant rule that matter subsequent to the original bill must come by way of supplemental bill and revivor *ibid*

Though by the 8 *W.* 3. a suit shall not abate upon the death of one defendant, yet it must be taken with this restriction, that the subject matter of the bill is not hurt thereby *ibid.*

Bill to perpetuate Testimony of Witnesses.

See **Evidence, Witnesses and Proof.** *Page* 449

See **Award.**

See **Answers, Pleas, and Demurrers.**

See **Amendment.**

Bonds and Obligations.

Where a joint obligor dies, his representatives shall be charged *pari passu*, with the surviving obligor in the payment of the bond 90

Where a bond is payable at installments and the obligee gets judgment on the whole penalty upon a breach of payment at the first installment; on payment of the money then due and costs, even a court of law will relieve the obligor 118

As to a bond for marrying. See 287

And **Bill for Discovery.**

A voluntary bond for the payment of a sum of money after the obligor's death is in the nature of a legatory disposition, and is void 292

A voluntary bond in equity shall be postponed to debts on simple contract; if claimed for money lent, and the person fails in proving his consideration, it cannot be set up afterwards as a voluntary bond 294

If an executor pleads *non est factum* to a bond, and not *plene administravit* likewise, he cannot after verdict take advantage of what might have been pleaded to the action *ibid.*

The plea of *non est factum* only is an admission of assets, and held the same as in case of a judgment by default against an executor *ibid.*

An executor can be relieved only against the penalty of a bond, by paying principal and interest, without regard to his having assets or not *ibid.*

A release to one obligor is a release to both, in equity as well as in law 294

Where there is an assignment of a bond in trust for others, precedent to a release, though without consideration, it is doubtful whether the obligee could release,

release, or if it could operate to the releasee, as he is a trustee in the assignment *Page* 294

Every man is supposed to be conusant of a deed, to which he himself is a party *ibid.*

Bottomree Bonds.

See Catching Bargain. 341.

Canon Law.

THE court of chivalry proceed according to the rules of the civil law, except in cases omitted, and there they go according to the course and custom of chivalry and arms 296

By the canon law an appeal is admitted from all grievances in general *ibid.*

As the court of chivalry is governed by the civil law, this court will not grant a commission of delegates, upon an appeal from any interlocutory order of that court, but only where there is a definitive sentence, or such a one as is termed in the civil law *gravamen irreparabile* *ibid.*

A person aggrieved by or interested in a sentence in the ecclesiastical court, may have a commission of delegates though he was no party to the original suit 298

Carrier.

See Bankrupt, under *Rule as to Principal and Factor*. 245.

Cases.

Where they are misreported.

See Portion, *Boycot* v. *Cotton*, where the Case of *Cave* v *Caze*, 2 *Vern*. 508. is mentioned.

An Anomalous Case.

See Portion, *Boycot* v. *Cotton*, where the Case of *Jackson* v. *Farrand*, 2 *Vern*. 424. is mentioned.

Cases imperfect, or denied to be Law.

See under Bankrupt, *Consignee*.

The case of *Pope* v. *Onslow*, 2 *Vern*. 286. the court said was very imperfect, and ordered it not to be cited for the future till it had been compared with the register *Page* 300

Catching Bargain.

The 17th of *May* 1738, Sir *Abraham Janssen* advanced 5000*l*. to Mr. *Spencer*, and the same day took a bond from him in the penalty of 20,000*l*. conditioned for the payment of 10,000*l* to *Janssen*, at or within some short time after the dutchess of *Marlborough*'s death, in case Mr *Spencer* should survive her, but not otherwise 301

The Dutchess died 18 *October* 1744, and in the month of *December* following, on *Janssen*'s delivering to Mr. *Spencer* the bond to be cancelled, he executed a new one in the penalty of 20,000*l*. conditioned for payment to *Janssen* of 10,000*l*. with lawful interest, on the nineteenth of *April* next, and at the same time executed a warrant of attorney to empower judgment to be re-entered up against him *in B R*. for 20,000*l*. which was done accordingly *ibid.*

In *December* 1745, Mr. *Spencer* paid *Janssen* 1000*l*. in part, and on the 21st of *March* 1000*l* more. On the 19th of *June* 1746, Mr. *Spencer* died, but before his death made his will, and after payment of debts, &c gave the residue of his personal estate to his son, and appointed Lord *Chesterfield* and others his guardians, and also executors in trust during his minority, who brought a bill to be relieved against *Janssen*'s demand as an unconscionable bargain and usurious contract 302

The court relieved only against the penalty and judgment, by directing Sir *Abraham Janssen* to deliver up the bond to be cancelled, and to acknowledge satisfaction on the judgment, upon being paid by the executors what should be due at law, but would not give him costs, as there was *probabilis causa litigandi*, and *Janssen*'s case far from being a favourable one. 302

Nothing is legally usurious but what is prohibited by the statutes, and to make a contract so, it must be within the express words, or an evasion or shift to keep out of them 340

If

a bargain was really for an annuity, though bought at ever so under a price, it is no usury; if on the foot of borrowing and lending money, otherwise. *Page* 340
Where there is a borrowing of money, and a communication for interest, a device to have more than the legal rate of interest, is within the statutes of usury *ibid*
The rule that governs the court in *bottomree bonds*, is the risque of the principal, but may be so contrived as to be construed an evasion of the statute, as well as any other contract 341
The court, not being under a necessity of doing it in *Janssen's* case, would not determine whether a person advancing money to an heir or expectant, should have an extraordinary premium for an extraordinary risque, because it might be made an ill use of out of the court. 342
Though the court might have relieved upon an original contract, yet they will not relieve against the confirmation of it, if fairly obtained 344
The contingency here, *a wager*, whether Mr. *Spencer* or the Dutchess of *Marlborough* died first 345
Where a bond is lost, no action can be maintained, because not pleaded with a *profert hic in curia* *ibid.*
The intent of the agreement, and not the expression, determines whether a contract be a loan or risque 346
Bottomree bonds are not usurious, because the whole money is in hazard *ib.*
There may be cases where the court will interpose to prevent improvident persons from ruining themselves, though no express fraud appears *ib d*
Agreements of this sort must depend on their particular circumstances 346
Post obits in general, not to be countenanced in a court of equity 347
The idea of usury in this country fully fixed, by the preminm for forbearance of money being settled 348
Bottomree bonds are not usurious, because not within the statutes of usury *ibid.*
Where the profit the lender is to have, is for *the hazard*, and not for the forbearance, the contract is not usurious *ibid.*
Lord Chief Justice *Lee* recommended it to courts of equity to consider how to prevent bargains, where a lender runs away with double what he advanced *Page* 348
By the *Macedonian* decree, all obligations of sons (living under the paternal jurisdiction) contracted by the loan of money, are declared null without any distinction, except the creditor advanced it for a cause that was just and reasonable 349
Lord Chief Justice *Willes* being ill, signified his concurrence in the same opinion, by letter to *Lord Chancellor* *ibid.*
This contract a plain fair wager, and not within the statutes of usury, because it is no loan 350
If there be a loan of money, and a contingency inserted which gives more than the legal interest, though real and not colourable, and *a hazard*, yet it is usurious *ibid.*
If a casualty goes to the interest only, it is usury, if principal and interest both *in hazard*, otherwise *ibid.*
The sound and fundamental reason for admitting bottomree bargains is their being *out* of the statute of usury 351
Loans upon a real and fair contingency are no more usurious than bottomree bonds *ibid.*
Contracts of this kind *vitia temporis* *ibid.*
Fraud must be proved at law, but equity relieves against presumptive fraud 352
Political arguments, as they concern the government of a nation, are of great weight in the consideration of this court *ibid.*
Law-makers in *Rome* thought it necessary to put a prodigal under the care of a curator 353
Brokers for *post obit* bargains and junction annuities ought to be discouraged in equity 353
New agreements and new terms may confirm what was at first a *doubtful bargain* 354

Charity.

The Power of this Court with respect thereto.

See **Devise**, *Attorney General* v. *Pik* under *Of things personal, and by what Description, and to whom good.*

The court of chancery will give a proper direction as to a charity, without any regard

regard to impropriety in the prayer of an information, and differs from all other cases, wherein the decree must be founded on the prayer Page 355

W. leaves money to be distributed in charity at the discretion of his executors, three named, one of whom died before the information filed. *This* is not a bare authority, but coupled with an interest, and the nominating who were to partake of the charity, survived to the other two executors 356

The court has a particular extensive jurisdiction in the case of a charity, and not tied down to the ordinary methods of proceedings in other cases *ibid.*

An information dismissed with costs against the relators, and said to be the first instance of it *ibid.*

On a legacy to a charity, interest is payable from the testator's death *ibid.* but see note

Chose in Action.

See Bankrupt. *Brown* v. *Heathcote*, under *The Construction of the Statute of* 21 Jac. 1. cap 19. *with respect to a Bankrupt's Possession of Goods after Assignment*,

Church Lease.

See Occupant.

Commission of Delegates.

See Canon Law.

Conditions and Limitations.

See tit Remainder.

A condition in a will that a legatee controverting the will shall forfeit his legacy is in *terrorem* 404

In what Cases the Breach of a Condition will be relieved against.

A. having been elected under doctor *Ratcliff's* donation, received a salary for five years, and then, instead of travelling beyond sea for five years more, as the will requires, upon ill health resigns, and the trustees accept the resignation, and put another in his room: *This* is a dispensation of the condition; if they had said when *A.* offered to surrender, we will not accept of your resignation, but you must comply with the terms, or refund, it would have been otherwise Page 358

Whether a fellow of a college has a power to let his chambers, is not the object of the court of chancery's jurisdiction, but ought to be determined by the *visitor* 360

In what Cases a Gift or Devise upon Condition not to marry without Consent shall be good and binding, or void being only in terrorem.

The trust of a term under a settlement was, that if there should be two or more daughters of the marriage: then the trustees were to raise and pay to each the sum of 2000 *l. if she marry with the consent of her mother, if living, and a widow; if not, then with the consent of the trustees, or the survivor of them, his executors, administrators, or assigns*: And in case any of the daughters die before the portion was paid, that it should not go to the executor, but the estate should be exonerated thereof, or if raised should go to him, on whom the reversion of the premisses is limited to descend 362

The father afterwards by his will gives the farther sum of 2000 *l.* to each of his daughters, *as and for an augmentation of their portions*, subject to the same conditions, provisoes, and limitations, as their original portions: And if any of the daughters die before the original portions become payable, then he wills that this 2000*l.* should not be paid to her executor, but that his lady and executrix should have the *residuum* of this money, and makes her residuary legatee: The plaintiff, Mr. *Harvey*, married one of the daughters without consent, and one *Clutton* another without consent: *They are not intitled to the portions either under the settlement or will.* 362

Where any act is to be done previous to any estate or trust, and that act consists of several particulars, every particular must be performed before the estate or trust can vest or take effect 374

It is now settled, that if a pecuniary legacy is given on condition of marriage

riage with consent, and there is no devise over, that such condition is void Page 375
Where a condition has been performed to a reasonable intent, the court will dispense with the want of circumstances; as where the major part of the trustees consent, or where they give an implied, not an express consent ibid.
Pecuniary legacies being sueable for in the spiritual court, is the reason why that law in some respects governs as to them; but this court does not follow it universally in this point, for where there is a devise over, it shall take effect 376
Where an estate is to arise on a condition precedent, it cannot vest till that condition is performed, even though it is become impossible ibid.
Though the civil law has no such term as condition precedent, yet the rule in that law *conditio suspendit legatum* is the thing in effect ibid.
It has been held ever since the case of *Amos* v. *Horner*, that the devise of the surplus of the personal estate, is a devise over ibid.
In the case of a condition subsequent, the thing is vested, and it becomes a penalty, and the intent must be plain, by an express devise over to divest it; in a condition precedent otherwise, for dispensing with the condition would be giving an estate against the intent of the donor; the particular penning of this settlement makes it a condition precedent, and vests nothing in the daughters till a marriage with consent 378
A condition to marry with consent is a lawful condition, and *a condition precedent*, and being annexed to these portions, nothing can vest till that condition is performed 379
It is the established rule since the case of *Powlet* v. *Powlet*, that portions charged on lands do not vest till the time of payment comes ibid.
The rule that a condition to marry with consent is *in terrorem* only, where there is no devise over, will not hold in all cases, but must be understood of legacies only, and not of *portions* ibid.
Portions arising out of land are subject to the rules of the common law only ibid.
If the daughter of a freeman of *London* marry against his consent, unless he be reconciled to her before his death, she loses her orphanage share Page 379
Where the party dies before a portion becomes payable, if issuing out of land, it shall not be raised; but if a personal legacy and legatee dies *before the time of payment*, it shall go to the executor; the ground of this distinction is, that in one case the court for uniformity follows *the ecclesiastical court*, and the common law in the other ibid.
The word *augmentation*, in the will of Sir *Thomas Alton*, shewed the additional were to attend the original portions 380, See the note 1, 381
P. D. devises to *J. G.* daughter of *T. G.* 200 *l. provided she marries with the consent of her father and mother, or the survivor of them* 381
J. G. before marriage, and during the lives of her father and mother, brings her bill against the executor, to have this legacy paid, the father and mother by their answers consenting: Marriage here, said the court, is a condition precedent, the plaintiff's application therefore too early, and her bill dismissed 381
If the words had stopped at *provided she marries*, it would not have vested till then, and the circumstances of consent will not vitiate the whole condition ibid.

Who are to take Advantage of a Condition, or will be prejudiced by it 382

E. W. devises lands to his second son *Thomas*, upon condition that *Thomas, or his heirs*, shall pay to my grand children (the children of the said *Thomas*) 90 *l.* to be equally divided among them, and on default of payment, a clause of entry and distress: *Thomas* died in the testator's life-time, the son of the eldest son of the testator entered on the lands as heir at law, and sold them: The legacy to the children of *Thomas*, the testator's second son, is a continuing charge on the lands in the hands of the purchaser, and they are intitled to be satisfied for the same with interest 382
A. devises lands to *B.* on condition to pay *C.* a sum of money, and no clause of entry on default of payment; the legatee

tee at law has no lien on the lands, but the heir of testator shall enter, and take advantage of the breach of the condition, and yet in this court the heir is considered only as *a trustee* for the legatee *Page* 383
A man by will may make an equitable as well as a legal charge on his estate, and this court will maintain it against the heir at law *ibid.*
Though a purchaser did not know of an incumbrance before he paid his money, yet, as he knew it before the deed was executed, it affects him, with notice 384

Confirmation.

When new agreements shall confirm what was at first an unfair bargain 354 note 1

Construction.

See tit. **Distribution and Exposition of Words.**

Whether the preamble can restrain the enacting part of an act of parliament 182
Whether by a devise of all lands, tenements and hereditaments, a mortgage in fee shall pass note 1 605
A gift to the parish church of *A.* has been construed a gift to the parson and parishioners of *A.* and their successors for ever 437
Item in a will is a conjunctive in the sense of *and* or *also* *ibid.*
Where a will directs payments out of lands *yearly* at a particular time, it cannot be altered to half yearly payments 438
A man cannot by any expression alter the nature of his estate 466
By a mortgage or sale of a brewhouse with the appurtenances, the utensils will not pass 477
Where a lease is renewed for the benefit of an infant, it is as a new acquisition, and will vest in the infant as a purchase, see tit *Guardian* 480
Where the words *to be raised by rents and profits* will imply a power of selling 551 note 1. 506
Where there is a power to charge an estate with a gross sum, it implies a power to charge with interest 552

Consideration.

See tit. **Conveyances fraudulent.**

Conveyances fraudulent. *vide p.* 13.

See tit. **Voluntary Deed.**

A settlement after marriage in consideration of a portion paid by the wife's father, good against creditors 13

Vide tit. **Agreement.**

Necessary to prove on the statute 13 *Eliz.* that at the making of a voluntary settlement, the person conveying was indebted at the time of the execution of the deed *secus* as to the stat. 27 *Eliz.* against purchasers 93, 94
The consideration of 5s. and *other valuable considerations*, does not oblige the court to hold the deed to be for a valuable consideration 94
The consideration of marriage is a valuable consideration without a portion 158
A settlement *after* marriage, upon payment of a sum of money as a portion, good against creditors and purchasers 190
A settlement by a widow previous to her second marriage, of her estate upon her grand children, held good against subsequent purchasers 265

Contract.

See **Catching Bargain.**

Copyhold.

In what Cases a defective Surrender, or the Want of it will be supplied in Equity 385

A. buys a copyhold estate for his own, and two lives, in the manor of——— where the custom was, that whoever purchases in it, the estate should go in succession, and by his will devises all his estate real and personal to his wife: Though the legal interest be according to the custom of the manor, yet *A.* has an equitable interest from being the sole purchaser, and shall be construed as a trust for him, he having advanced the money 385

Where

Where a man devises all his estate real and personal to a wife or child, and has no other real estate but the copyhold, it shall pass by those general words *Page* 386 n. 1

Where *a copyhold* is devised to the wife, the court will supply the want of a surrender, even though she has a provision under a settlement *ibid.*

The rule that the court will not supply a surrender against an heir, must be applied solely to an heir in blood, and not to a *hæres factus* *ibid.*

A father purchases land in his son's name, his son being then 18 years of age, the father continued in possession till his death: This shall be considered as an advancement for the son, and not a *trust* for the father *ibid.*

Parol evidence, though improper, when offered against the legal operation of a will, or an implied trust, shall be admitted where it is in support of law and equity too *ibid.*

A. gives all his lands unsettled, and all his goods and chattels to his wife for life, and afterwards to his younger children, in such manner as she should think fit to dispose of the same: The testator died seised of freehold lands and customary messuages, which were *unsettled*, and not surrendered to the use of his will: The land settled being only freehold, naturally the lands *unsettled* must be the same, and therefore the copyhold lands did not pass 387

Where there is no surrender of copyhold lands to the use of a will, they will not pass by a general devise of lands 388

Though there should be no surrender to the use of a will, yet it is sufficient to pass an equity in copyhold lands *ib*

This court will not supply the defect of a surrender of copyhold estates in favour of a wife or younger children, to the disinherison of an heir unprovided for *ibid.*

Disinherison is not confined to descent, for if an heir is provided for by settlement, or any other way, he cannot be said to be disinherited *ibid*

N. S. by will devises to his wife and her heirs, all his freehold and copyhold lands, being well assured she would, at her decease, dispose of the lands amongst, all, or *such* of his children, as by their conduct should deserve it 389

The wife devises all the freehold and copyhold lands, except the copyhold in *Hampton*, to her daughter, and her heirs, and *that copyhold* to the heir at law of the testator, and his heirs. The testatrix gave directions for surrenders of the respective copyhold estates to the use of the will, but died before they were perfected: The heir not being *totally unprovided for*, the court supplied the surrender *Page* 389

The word *such* gave the wife the power to devise the whole to one child if she had thought fit *ibid.*

The trust of a copyhold not necessary to be surrendered 390

No person can make a common law conveyance of a copyhold estate 96

The court can order the trustee of a copyhold estate to surrender the legal estate, though the *cestui que trust* refuses 215

See **Power**, under *Of the right Execution of a Power, and where a Defect therein will be supplied.*

See **Bankrupt**, under *Rule as to Copyholds under the Commissions of Bankrupts.*

Creditor and Debtor.

What Conveyance or Disposition shall be fraudulent as to Creditors.

See **Agreements, Articles and Covenants**; *Russel* v. *Hammond* under *Voluntary Agreements, in what Cases to be performed.* 13

See **Bankrupt**, *Walker* v. *Burrows*, under *Rule as to Assignees.*

What Conveyance or Disposition shall be good against Creditors.

See **Bankrupt**, *Brown* v. *Jones*, under *The Construction of the Statute of* 21 Jac. 1 cap 19 *with respect to a Bankrupt's Possession of Goods after Assignment.*

General Cases of Creditors and Debtors.

A father, by articles previous to the marriage of his son, covenants at the end of three years after the solemnization thereof, to pay to trustees, their executors,

cestors, &c. 12,000*l.* to be settled to the husband for life, to the wife for life, then to the use of the first and other sons in tail male, *remainder to the daughter and daughters in tail general*, remainder to the right heirs of the husband *Page* 392
Provided if there should be *but one daughter, and no other child*, and the heirs, &c. of the husband should, within three calendar months after his death, pay to the trustees 4000*l.* then all the uses limited *to such daughter*, and the heirs of her body in the 12,000*l.* should cease and be void, and from thenceforth should be to the use of the heirs and assigns of the husband *ibid.*
The husband dies, leaving no child *but a daughter*, and by his will had devised the 12,000*l.* and all his property in the same, and in the lands to be purchased therewith, subject to the trusts, to his father, his heirs, &c. and appointed him executor: He lets the three months lapse without paying the 4000*l.* as he had not personal assets sufficient to pay it *ibid.*
Mr. *Frederick*, a judgment creditor of the husband, brought his bill to be paid principal, interest, and costs out of the personal assets of the testator, and if not sufficient, it was insisted that the husband's reversionary interest in the 12,000*l.* ought to be deemed real assets, and applied in payment of his demand *ibid.*
The reversionary interest in the 12,000*l.* together with the benefit of discharging the same from the estate tail limited to the daughter, was considered by *Lord Chancellor* as real assets, and the plaintiff, Mr *Frederick*, notwithstanding the three months were lapsed without payment of the 4000*l* the court held, ought not to be prejudiced, but let into the benefit of the redemption *ibid.*
The husband, said *Lord Chancellor*, by purchase from his father, was made owner of the fee in the estate to be bought with the 12,000*l* and was therefore in nature of a right of redemption in the son, and not a mere naked power 394
Where an heir or executor have omitted to do an act within a limited time, it shall never be to the prejudice of a creditor, but he shall be admitted to do it himself *Page* 394

See under **Bankrupt**, *Grove*, and under *Rule as to Landlords.*

See **Trade and Merchandize.**

See **Executors and Administrators** under *What shall be Assets.*

See **Devise**, under *Devise of Lands for Payment of Debts.*

See **Bankrupt**, under *Rule as to Partnership.*

Costs.

Upon payment of 20*s.* costs, a bill may be amended after an answer put in, but *Lord Chancellor* said he would consider how to make a more adequate compensation to a defendant for the future, after a long answer, and other necessary proceedings had on the part of the defendant 396

See **Bankrupt**, under *Rule as to Costs.*

See **Evidence, Witnesses, and Proof.**

See **Charity.**

Covenant.

See tit. **Agreements. Award.**

The issue in tail are not bound by the covenant of the ancestor. *Secus* as to the assignees of a bankrupt 10 *n.* 3
423 *n.* 2
A covenant by the husband, respecting his wife's expectancy, binds him, tho' the wife was an infant 64
Where a release shall amount to a covenant to stand seised 191

Courts and their Jurisdiction.

How far Chancery will or will not exert a Jurisdiction, in Matters cognizable in inferior Courts.

See under **Bankrupt**, *Butler and Purnell*, under *Rule as to the Sale of Offices under a Commission of Bankruptcy.*

Court of Chivalry.

See Canon Law.

Curtesy.

See Tenant by the Curtesy.

Custom of London.

Concerning the Custom with respect to the Children of a Freeman, and here, of Advancement, bringing into Hotchpot, Survivorship and Forfeiture.

See Award and Arbitrement, *Metcalf* v. *Ives*, under *For what Causes set aside*.

What Disposition made by a Freeman of his Estate shall be good, or void being in Fraud of the Custom.

A father having *five* children, three of age, and two infants, enters into an agreement with them, that he would come to *London* and take up his freedom, provided they would release any right or demand they may be intitled to in respect of the father's personal estate, by virtue of the custom of the city of *London*: An agreement drawn up accordingly and executed by the father and the three children who were of age *Page* 399

A bill brought by the plaintiff, and his wife, one of the daughters *who was of age* at the time of the agreement, for her customary share of the father's estate, he having in his life-time taken up his freedom *ibid.*

A court of equity will not interpose in voluntary agreements, where they have been entered into without fraud 401

The agreement, *Lord Chancellor* held, could not operate as a release, for want of an interest in the children for it to operate upon; for they had neither *jus in re*, nor *ad rem*, the whole being in the father during his life *ibid*

Agreements of this kind he said ought not to receive any encouragement, and founded manifestly on a mistake of the father. It is a known rule in equity, to relieve against such agreements as are founded on mistakes 402

The custom of *London* admits of no such bar, for nothing but an actual advancement of a child will have that effect: But if a daughter, who has a portion given by a father on marriage, agrees to take it in satisfaction of any demand she may afterwards have on his estate, this amounts to a bar *Page* 402

A father's preferring a child in marriage, or advancing money to set up a son in trade, may amount to a bar of his customary share; but in all those instances there must be a valuable consideration moving from him, and an actual benefit accruing to the child 403

A, on his marriage with one of the daughters of *John Burrows*, had an estate in land settled on him, and the uses of the settlement purchased with the father's money, but signed a note to the father as a receipt for so much more money advanced for his wife's fortune, this must be considered as money, and brought into hotchpot *ibid.*

Where a wife is compounded with on marriage, by having a jointure, settled on her in lieu of her customary share, the husband shall not be considered as a purchaser of her third, but the orphanage share shall then be a moiety of his estate *ibid.*

Where money is expressed to be given in part of a portion, though of small amount, yet it is advancement, and must be brought into hotchpot *ibid.*

An agreement must depend on the circumstances at the time, and cannot be made better or worse by subsequent facts 404

A provision by will that a legatee controverting the disposition of the estate shall forfeit his legacy, is *in terrorem* only, and though he contests, it does not forfeit *ibid.*

A person cannot take by the custom, and under the will in any instance whatever *ibid.*

What is, or is not, an Advancement.

If a child or children of a freeman of *London* are advanced in the father's life-time, they shall be said to be fully advanced, unless the *quantum* of the advancement appears in writing under his hand 406

This

This custom will hold equally with regard to an only child, as where there are many children Page 407
Parol evidence of a father's declaration, will not be allowed to debar a child of her orphanage share; but proofs of declarations by the husband, in regard to an advancement in marriage with the daughter of a freeman, will be admitted as evidence, because they are declarations against his own interest ibid.
Proofs also of declarations of the wife, made during the coverture of her first husband, may be read against the second, and will bind as much as if made after the death of the first, and before marriage with the second husband ibid.
Unless what a freeman has advanced to a child appears by some book, written with the freeman's own hand, the court will not direct an inquiry whether it was a full advancement 408
Where a father or mother are in low circumstances, the child ought to be maintained out of a provision left by a collateral relation

Decree.

AN original independent decree may be had in the court of chancery, where all the facts are stated by the bill, notwithstanding there was a former decree for the same matter in *Wales* ibid.
An infant may have a decree upon any matter arising on the state of his case, though not particularly prayed by his bill 6

Deeds and other Writings.

Deeds and Instruments entered into by Fraud, in what Cases to be relieved against.

Though a man is arrested by due process, yet if he is obliged to execute a conveyance whilst under arrest, this court will construe it a duress and relieve against such conveyance 409
Every man is supposed to be conusant of a deed to which he is a party 294

See Heir and Ancestor.

See Voluntary Deed and it's Effects.

Demurrer.

Vide Answers, Pleas, and Demurrers.

Vide Bill for Discovery.

Vide Evidence, Witnesses and Proof. 449

A demurrer bad in part, void *in toto*; otherwise as to a plea. Page 450
There cannot be two demurrers to the same bill note 1 451
Nor can there be a saving of any thing on a demurrer ibid.

See tit. Plantation. 544

Devises.

Where money being entailed under a will shall or shall not go to the first taker 286. 429

Executory Devise.

See *Hayward* v. *Stillingfleet* 422
By a devise of all lands, tenements, and hereditaments, a mortgage in fee shall pass note 1. 605

Of Void Devises by Uncertainty in the Description of the Person to take.

In a devise any thing that amounts to a *designatio personæ* is sufficient, and tho' bastards strictly are not sons, yet if they have acquired that name by reputation, in common parlance they are 410
Though a person's name is mistaken in a devise, yet if made out by averment to be the person meant, and can be applied to no other, the devise to him is good ibid.
R. L. devises to *R. M.* eldest son of his nephew *R. M.* and the first heirs male of his body, and in default of such issue, *to the second son of the said* R. M. and the heirs male of his body, and their issue; remainder over *&c.* These words, *the second son of the said* R. M. do not mean the second son of the devisee, but *John* the second son of the testator's nephew *R. M.* 411
A court never construes a devise void, unless it is so absolutely dark that they cannot find out the testator's meaning 412

Words of limitation super-added to preceding words of limitation, will not make *the first* words of purchase, but the subsequent ought to be rejected as redundant *Page* 413
Subsequent words of limitation affect not the legal operation of the preceding words of limitation, unless the word heir is used in the singular number, or an express estate for life limited to the first taker *ibid.*
No stress to be laid upon the word *first*, it means only that they should take in succession according to priority of birth 414
R. R. gives to his niece *A S.* 5000 *l.* in the old *S. S.* annuity-stock of the *S. S.* company, and to his nephew *R. P.* 5000 *l.* in the old *S. S* company. At the time of making his will, and at his death, testator had only 5000 *l.* in old *S. S* annuity-stock *ibid.*
Lord Chancellor said, they are to be considered as two distinct legacies, and *A. S.* and *R. P.* are intitled to have them made good out of the testator's assets, and the executor was directed to purchase out of the personal estate 5000 *l.* old *S. S.* annuity-stock, and transfer one moiety to *A. S.* and the other moiety to his own use, and the 5000 *l.* old *S. S.* annuities, which the testator died possessed of, to be applied proportionably towards payment of the legacies to *A S.* and *R. P.* 414
Mistakes in making wills are never to be supposed, if any construction that is agreeable to reason can be found out 415
Every clause in a will shall be construed so as to take effect according to the testator's intent, if it is consistent with the rules of law 416
Where a particular chattel is specifically described and distinguished from all other things of the same kind, and is not found among the testator's effects, it fails; or if given first to *A.* and then to *B.* they must divide it; or if disposed of in testator's life-time, it is an ademption of such legacy 417
In our law, said *Lord Chancellor*, particular legatees are always preferred before the residuary legatees, (though otherwise in the *Roman* law), the *residuum* being considered by us as *the gleanings* of the testator's estate 418

Of Devises of Lands for Payment of Debts.

A. by his will, first gives an estate for life to his wife, and in the latter part creates a trust term for payment of debts to take place from the day of his death: The term though subsequent, shall take place of the wife's estate for life, especially as it is a trust term for raising money *Page* 419
Immaterial how a testator places the several devises in a will, because the whole must be construed together, so as to make it consistent *ibid.*
A testator devises all his real and personal estate to be sold for payment of his debts, and appoints the defendant executor; the personal estate not being sufficient, a bill was brought by bond, and note creditors of the testator, to be paid their demands out of the real estate. The question, whether the executor can sell the same, as the testator had given it generally to be sold, without directing who should sell 420
Lord Chancellor was of opinion the money arising from the sale would be legal assets in the hands of the executor, and therefore thought it a reasonable construction that he should be the person to make the sale, and decreed accordingly *ibid.*
Where lands are devised to trustee to be sold for payment of debts, and the heir is an infant, he has no day to shew cause when he comes of age; but if the lands are not devised to any particular person it is otherwise 421
A proviso in the will of *R B.* that if his personal estate, and house and lands at *W.* should not pay his debts, then *his executors to raise the same out* of his copyhold premisses *ibid.*
The rents not being sufficient to discharge testator's debts, these words will give the trustees a power to sell the copyhold lands to satisfy his intention of paying his debts *ibid.*
W. H by will, gave 100 *l.* to his daughter *Francis*, and 450 *l.* between two other daughters, and then devises his land in trust for a term of nine nine years, with a power to raise a less term upon trust, that if his wife should within four years pay off the 550 *l* then he gives the lands to her for life, and after

after her death to *W. H* his son and his heirs male and female, and for want of such issue, to him and his heirs for ever *Page* 422

This, said the court, is a conditional limitation in the wife, taking place as an executory devise, and if so, the freehold descended to the son as heir at law to the testator, till the four years were elapsed, or his wife had performed the condition, as a part of the inheritance undisposed of, and by this devise the son had a good estate tail in the inheritance, expectant on the determination of the term of ninety-nine years *ibid.*

Wherever there is a limitation with remainder over made in the words of a condition, which would be construed as a condition, if they could take effect ought to be construed as a limitation if they cannot 424

Where a Devise shall or shall not be in satisfaction of a Thing due.

A. gives an annuity of 20*l.* to his daughter, and the heirs of her body, quarterly, without any abatement. *B.* the surviving executor of *A.* gives to the daughter of *A.* and her daughter, an annuity of 20*l.* by his will, to be paid quarterly without any abatement, out of his freehold houses in *Holborn*, and if they die without issue, then to return to the plaintiff his heir, and by indorsement upon the will, with a pencil, says, I hope this 20*l.* will not be taken for another 20*l.* annuity, but to confirm the 20*l. per ann.* her father left her and her daughter 425

The indorsement of no weight, as nothing can either enlarge or diminish what affects real estate, unless it be executed according to the statute of frauds and perjuries *ibid.*

In construing one legacy to be a satisfaction for another, regard must be always had, said *Lord Chancellor*, to the particular circumstances, limitations, and funds out of which the two several legacies are to arise: The daughter of *A.* not entitled to both annuities, for his surviving executor, who was alone chargeable by way of personal demand, might, by way of exoneration of the father's personal estate, direct that if she took the annuity under his will, she should not have it out of his father's personal estate *Page* 426

R. B. on his marriage in 1711, settled exchequer annuities for 99 years, amounting to 300*l. per ann.* in trust for himself for life, remainder to his wife for life, remainder to his children, in such manner as he should appoint: By the marriage, only one child, a daughter. In 1720, *R. B.* devised all his real and personal estate to his wife, and her heirs, charged with 10 000*l.* as a portion for his daughter, payable at 18. After the death of *R. B.* his wife makes her will, and gives all her real and personal estate to her daughter and her heirs, *but if she die before she was of age to dispose*, then to trustees to raise 6000*l.* for a charity, the residue thereof if her daughter dies unmarried, to the sisters of the testatrix: The daughter, after the mother's death marries Mr. *Bellasis*, has issue a daughter, and dies about the age of twenty 426 & 427

Bellasis, as representative of his wife, and in his own right, brings a bill for an account of the real and personal estate of *R. B.* and his wife; the daughter, said the court, is entitled under the settlement to the exchequer annuities, as an interest vested in her, and the father had only a power of disposing thereof among his children as he thought proper, and there being only one child, she is entitled to the whole *ibid.*

The 10,000*l.* devised by the will of the father to the daughter, shall not be taken to be in satisfaction of the annuities; though this court leans against double portions, yet regard must be had to circumstances; as where there is an eldest son, or more children, and the demand would be to their prejudice, but here it is an only child 427

The thing given in satisfaction must be of the same nature, and attended with the same certainty, as that in lieu of which it is given, and land is no satisfaction for money, nor *vice versâ*, money for land; and though they are both of the same nature here, yet the legacy of 10,000*l.* is subject to a contingency of her arriving at 18, and a mere contingency shall not take away

a portion absolutely vested, especially in the case of an only child P. 428
As a person at the age of 14 may dispose of personal estate, as the law now stands, the daughter entitled at that age to all the personal estate devised to her by her mother; and as she made no disposition, will go to the husband ibid.
The word *thereof* must be construed *reddendo singula singulis*, as applied to personal or real estate ibid.
The residue of the mother's real estate, after the charity, shall go to the daughter, and so to the husband, as the contingency on which it is given over has never happened; and besides, in doubtful cases, the heir is always to be preferred 428

See Dower and Jointure.

What Words pass an Estate-tail.

A. by his will devises to his eldest son *Jonathan* a real estate for life, remainder to his sons in tail male, remainder to testator's second son *John* for life, remainder to his sons in tail male, remainder to plaintiff's father *George Ivie* for life, remainder to his sons in tail male, remainder over. And also gave to three trustees two long annuities of 100*l.* each in trust, as to one for the plaintiff's father for life, and then to the plaintiff for life, remainder to the issue male of his body, remainder over; and as to the other, in trust for testator's son *Robert* for life, and in default of issue male, remainder to *John Ivie* for life, remainder to his issue male in tail male, remainder to *George* for life, remainder to plaintiffs for life, with divers remainders over, and appointed *John* his executor, who possessed himself of the title deeds of the real estate, and tallies belonging to the annuities. *Jonathan Ivie* is dead without issue, *Robert* likewise without issue male, and the son of *John Ivie*, born after testator's death, is since dead, and his father has administred. In 1720 *John* joined with *George* in the sale of the annuity devised to *George* for 3250*l.* and the purchase money paid to *George* 429 & 430
The plaintiff, the son of *George*, brings his bill to have the deeds and writings relating to the real estate deposited in court; and as to the annuity devised to *John* and to plaintiff in remainder, to have security given for the payment of it, when his interest therein should take effect in possession. And as to the other annuity, to have a satisfaction against *John* for the breach of trust in concurring in the sale thereof to the plaintiff's prejudice, and for an equivalent upon the death of his father *George Ivie* Pages 429 & 430
Lord Chancellor of opinion, as to the annuity devised to *Robert*, and afterwards to *John* for life, &c. that there being words of limitation annexed, such as would create an estate tail in the case of real estate upon the birth of a son of *John*, the whole interest in remainder vested in such son; and that *John*, as administrator to his son, is absolutely entitled to it, and, as to this demand, dismissed the bill 430
Where a trustee has been corruptly guilty of a breach of trust, the court will compel such trustee to make satisfaction to the utmost; but as to the annuity sold by *John*, as it was at the instance of *George*, and the money received by *George*, he would not charge *John* with the price the annuity was sold at, but decreed that *George* and *John*, or one of them, do, at their own charge, purchase an exchequer annuity of 100*l.* a year, for 99 years, and assign the same to trustees, to be approved of by the master, and the trusts thereof to be declared according to the limitations in the will ibid.
His Lordship refused to direct the deeds and writings to be deposited in court, because the plaintiff's interest in the real estate was too remote to warrant it, and is never done, but in the case of a remainder man, whose estate is expectant on a mere tenancy for life 431
R. W. by his will devised to his wife *Elizabeth* all his lands, &c. not settled in jointure, and then says, if it shall happen that she shall have no son nor daughter by me, *for want of such issue*, the said premisses to return to my brother (the plaintiff) if he shall be then living, and his heirs for ever paying to *A.* and *B.* 150*l.* within a year after *Elizabeth*'s death: Decreed to be an

estate tail in *Elizabeth*, because where preceding words are proper to create an estate tail the legal operation of them cannot be controlled by subsequent provisions *Page* 432

The words, if *Elizabeth has no son nor daughter*, must be understood having no issue, and the words for want of *such* issue amount to the same as if the testator had said for want of issue generally 434

Of Things personal, as Goods and Chattels, &c. by what Description, and to whom good.

A, devises a freehold messuage at *Romford* to a charity school there, and directs the rents and profits to be applied for the benefit of the school, *so long as it shall be continued to be endowed with charity:* And by the same will, reciting a debt of 1000 *l.* to be owing to him, gives the said sum to the coopers' company to build alms-houses: The debt devised by the will, instead of 1000 *l.* amounted to 365 *l.* 16 *s.* 7 *d.* only: the freehold estate being devised to a charity, so long as it continues to be endowed with charity, is only *quousque*, and when it ceases, as it is a gift of real estate, it shall revert for the benefit of the heir of the testator 435

Though the debt devised by the will amounts only to 365 *l.* 16 *s.* 7 *d.* yet the wrong description, and falling short, will not defeat the legacy *ibid.*

Where a person gives a debt by his will to a corporation, they may recover it in the ecclesiastical court *ibid.*

What Words pass a Fee in a Will.

T. C. by will gives to the *Latin* school of *Yeovill*, if any man is possessed of it that teacheth boys, and is richly grounded in the *Latin* tongue, five pounds, to be paid him yearly, for teaching and instructing three boys: As it is not to a particular school-master, but to the school itself, it is a perpetuity, and the general words for instructing *three* boys mean three in succession, one after another 436

A gift to the parish church of *A.* has been construed a gift to the parson and parishioners of *A.* and their successors for ever 437

Item in a will is a conjunctive in the sense of *and* or *also*, and is only made use of to distinguish the clauses *Page* 438

Where a will directs payments out of land yearly, at a particular time, it cannot be altered to half yearly payments 438

For more of Devises,

See **Will**, under *Bills of Discovery.*

See **Exposition of Words.**

See **Dower and Jointure.**

See **Legacy**, under *Ademption of it.*

See **Conditions and Limitations.**

Distribution, (*Statute of.*)

See tit. **Executors and Administrators.**

Aunts and nephews in the same degree of relation to an intestate, and equally intitled under the statute of Distributions 454

Where an intestate leaves brother's or sister's children, and no brother or sister, they take *per capita* as next of kin, and not by representation: So if he died, leaving aunts and nieces, and no brother or sister, they would all take *per capita*; but if the father of the nieces had been living, he would have taken the whole 456

The statute of Distributions, and the statute of *Jac.* 2, very incorrectly penned, and therefore the latter is to be construed according to the intent of the legislature 457

The word *and* in the 7th section of 1 *Jac.* 2. *c.* 17. immediately preceding the words *the representatives*, must be construed in the disjunctive 457

The proviso in the statute of *James* is to be incorporated into the statute of *Charles* where it says, that representations shall not be carried beyond brothers and sisters children. The rule is, that statutes made *pari materia* shall be construed into one another 457

The word *relations* or *kindred* in a will (without any specification of what relations or kindred) is confined to such as are within the statute of Distributions *note* 1. 469

Dower and Jointure.

What shall be a good Satisfaction, or good Bar of Dower, and how far a Dowress will be favoured in Equity.

A provision for a wife, in articles before marriage, thereby declared to be in full satisfaction of dower, or any claim or right by Common-law, custom of the city, or any other usage, law or custom notwithstanding The wife survived the husband, and accepted of the terms mentioned in the articles · This demand of the wife, said the court, may be extinguished by agreement, and as she was an infant when the articles were signed, and had her election at her husband's death, which she has made by accepting what was designed as a satisfaction for dower, she has barred herself thereof Page 439

The words in the articles, *any law, usage, or custom notwithstanding*, extend to the husband's personal estate, and bar the wife of her share, under the statute of distributions 440

Of making good a Deficiency out of a Husband's Assets.

A widow brings her bill to have the deficiency of her jointure made good out of the assets of her husband, and his father, and also for 1000*l.* left her by her husband, payable with interest from three months after his death, and for her *paraphernalia* ibid.

The father and son having covenanted that the lands settled upon her for her jointure were worth 300*l.* per ann. and being both parties to the marriage contract, it was held, she had a lien upon the estate of the father and son; and an account of assets was decreed, and that the deficiency should be made good out of the son's estate, it appearing that he had received most of the fortune 440

The 1000*l.* given by the will to the wife, said *Lord Chancellor*, cannot be considered as a satisfaction for the deficiency of her jointure, for as the jointure lands are covenanted to be worth so much clear of all reprizes, the testator intended the 1000*l.* as a bounty 441

If a person in the execution sufficiently describes the estate, he had a power to charge, the estate is bound though there is no reference to the deed out of which the power arises Page 441

Where there are real estates descended, the wife may be intitled to her *paraphernalia*, but otherwise in this case, where the real estates came by the husband. ibid.

Of what Estate of the Husband's with respect to the Nature and Quality thereof, shall a Woman be endowed.

Ralph Sneyd, being seised in tail male of several manors, and lands, and in possession of great part thereof, and having purchased several others, intermarried with the defendant the plaintiff's mother, and died in *October* 1733 intestate: The plaintiff, as his eldest son and heir in tail, brings a bill to set aside the assignment of dower for partiality, upon a suggestion that part of the estate was copyhold, and not liable thereto 442

If the husband became entitled to the copyhold estates by copy of court-roll, and granted them out again by copy of court roll, his wife is not entitled to dower; but if he became entitled otherwise than b copy of court roll, and did not grant them out again by copy of court roll, she is entitled to dower out of those estates ibid.

A wife is not entitled to dower out of an instantaneous seisin 443

The conusee of a fine is not so seised as to give the wife a title to dower; nor in the case of a use has the widow of a trustee any claim of dower from such a momentary seisin in the husband 443

Duress.

If a man be legally arrested, and whilst under the arrest, is obliged to execute a conveyance, this is duress, and the court will relieve 409

See Power, under *Of the right Execution of a Power, and where a Defect therein will be supplied. Hervey v. Hervey.*

Ejectment.

See **Joint-tenants and Tenants in Common.**

Estate for Lives.

See **Occupant.**

Estate Tail.

See **Devise.**

Evidence, Witnesses and Proof.

What will, or will not be admitted as Evidence, and will amount to sufficient Proof.

THOUGH a bill in chancery cannot be received in evidence at law, yet in this court may be read, and has been often allowed as evidence *Page* 65

The court will allow the proving of exhibits *vivâ voce* at the hearing, but not to let in other examinations, and this only at the application of the party who is to make use of the exhibits, but no instance where it is allowed at the application of the contrary party 414

Where a person has been examined here, his deposition may be read at law, *between the same parties* if proved to be dead, or sick, or out of the kingdom 445

Where an original note is lost, and a copy of it is offered in evidence, you must shew the original note was genuine, before you will be allowed to read the copy 446

See **Award and Arbitrament.** *Metcalf* v. *Ives*, under *For what Causes set aside* 03

See **Alien**, 21.

See **Bankrupt.** *Eade* v. *Lingood*, under *Rule as to Examinations taken before Commissioners* 203

See **Power.**

See **Bill**, under *Bills of Discovery*, &c. 285

Where parol or collateral Evidence will, or will not, be admitted to explain, confirm, or contradict what appears on the Face of a Deed or Will.

See **Copyhold**, *Taylor* v. *Taylor* 386

A bill brought to set aside an assignment of a leasehold estate, *&c.* upon suggestion that it was not intended as an absolute assignment, but subject to a trust for the plaintiff's benefit; though no express trust in the deed, yet, as it might be collected from circumstances arising out of the assignment itself, inconsistent with an absolute disposition; and other circumstances creating a strong presumption of a trust; *Lord Chancellor* admitted parol evidence to explain this transaction *Page* 447

Though there can be no parol declaration of a trust since 29 *Car.* 2. yet parol evidence is proper here in avoidance of fraud intended to be put upon the plaintiff 448

A person left *A.* 20 *l.* *per ann.* by a codicil to his will, and after talking of making another codicil, and leaving him 15 *l.* more, the attorney told him, that if *B. C.* and *D.* whom he had made devisees of his estate, would give him a bond to pay him 15 *l.* *per ann.* it would be sufficient; *B.* being present, promised that he and the devisees would, and a draft was prepared, but not executed; testator lived five weeks after, and *A.* remained nine years without demanding the performance of the promise or draft to be perfected, and then brings his bill; dismissed at the Rolls, and upon appeal, decree of dismission affirmed *ibid.*

The court will not add a legacy to a will upon parol proof, though it concerns the personal estate only; *a fortiori* where it tends to charge lands 449

It is not in the power of the court to relieve against accidents, which prevent voluntary dispositions of estates 449

Of examining Witnesses de bene esse, *and establishing their Testimony* in perpetuam Rei Memoriam 450

Bill brought to perpetuate the testimony of witnesses to a bond charged to be usurious, and alleging that the defendant, one *Green*, whom the plaintiff wanted to examine, was very aged and infirm: *Green*, who was a *nominee* only in the bond, demurred, as the bill sought to subject him to a penalty, and-

and alſo as the plaintiff does not offer to pay what is really due *Page* 450
If the demurrer had ſtopped at the firſt part, it would have been good, but as it goes to the perpetuating the teſtimony, it is bad, and over ruled, but without prejudice to *Green*'s inſiſting on the ſame thing, by way of anſwer *ibid.*
A truſtee has as much the benefit of the pleading of this court, as he that has the equitable intereſt, and *ceſtuique truſt* is entitled to have the privilege maintained by the truſtee *ibid.*
A plaintiff is entitled to perpetuate the teſtimony of witneſſes to an uſurious contract, notwithſtanding his not offering, by the bill, to pay 451
A man may bring a bill to perpetuate the teſtimony in many caſes, where he cannot bring a bill for relief, without waiving the penalty, as in caſes in waſte, &c *ibid.*
A demurrer, bad in part, is void *in toto*, otherwiſe as to a plea *ibid*

See Purchaſe, under Of Purchaſers without Notice

Of the Sufficiency or Diſability of a Witneſs

Though a wife is a defendant, and charged with fraud and mal practices, yet the evidence of the huſband ſhall be admitted, where the intereſt of a third perſon ſhall be concerned *ibid.*
A perſon, who at law is put into a *ſiv illum*, may be admitted as a witneſs, that he may not be made a defendant, only to take off his evidence, but if there is ſtrong proof that he is *particeps criminis*, he will be excluded from being a witneſs 452
Where a feme covert has been guilty of a fraud ſolely without the huſband, there is no precedent of the court's making him pay coſts 453

Rules the ſame in Equity as at Law

The rules, as to evidence, are the ſame in equity as at law *ibid*
Where two leaſes are ſet up, you cannot read one of them, till you have proved poſſeſſion under that leaſe *ibid.*
To ſhew a title in the leſſor, he muſt prove actual payment of rent, receipts alone will not do *Page* 453
Bailiffs rentals are evidence of payments *ibid.*
Maſters in Chancery in reports are only to ſtate bare matters of fact 454

Executors and Adminiſtrators.

See Fixtures.

The intereſt and authority of executors is joint and cannot be divided into diſtinct powers 495

Who are intitled to a Diſtribution.

Aunts and *nephews* are in the ſame degree of relation to an inteſtate, and equally entitled under the ſtatute of diſtributions No right of repreſentation here, but muſt take *per capita*, and not *per ſtirpes* 454
William Stanley and *Anne* his wife had two ſons, *George* and *Hoby*, who ſeverally married in their father's life time; *William*, the father, dies; *Anne*, his wife, ſurvives him *George* afterwards dies, and leaves ſeveral children, who are ſtill living; then *Hoby* dies inteſtate and without iſſue, leaving *Philippa* his wife poſſeſſed of a very large perſonal eſtate. The children of *George* brought a bill againſt *Philippa*, who had adminiſtered to her huſband, and alſo againſt *Anne* their grandmother, inſiſting, that, as *the repreſentatives* of their father, they were entitled, with their grandmother, to one half of the moiety of the inteſtate's eſtate, the wife being entitled to the other moiety, by 22 & 23 *Car* 2 *cap* 10 455
The reſidue of the inteſtate's eſtate, after ſatisfaction of debts, was by *Lord Chancellor*, directed to be divided into four equal parts, two fourths thereof to be retained by *Philippa* the inteſtate's widow, one other fourth part to be paid to *Anne Stanley* the inteſtate's mother, and the remaining fourth part to be laid out in *South ſea* annuities, in the name of the accomptant general, ſubject to the order of the court for the benefit of the children of *George*, equally to be divided 455

Where

Where an intestate leaves brother's or sister's children, and no brother or sister, they take *per capita*, as next of kin, and not by representation: So if he died, leaving aunts and nieces, and no brother or sister, they would all take *per capita*; but if the father of the nieces had been living, he would have taken the whole *Page* 456

The statute of distributions, and the statute of *Jac.* 2. are very incorrectly penned, and therefore the latter is to be construed according to the intent of the legislature 457

The word *and* in the seventh section of 1 *Jac. cap.* 16. immediately preceding the words *the representatives*, must be construed in the disjunctive. *ibid.*

The proviso in the statute of *James*, is to be incorporated into the statute of *Charles*, where it says, that *representations* shall not be carried beyond brother's and sister's children: The rule is, that statutes made *pari materia*, shall be construed into one another *ibid.*

Of Administration to whom to be granted.

A. survives her first husband, who left her a legacy; she dies, the legacy being unreceived by the second husband during her life, after her death he administers, and dies before the legacy came to his hands; his administrator gets it in, and the administrator *de bonis non* of the wife brings this bill for the legacy 458

A court of equity considers the administrator *de bonis non* as a trustee for the administrator of the husband, who having an absolute right by surviving his wife, his administrator ought to have the benefit of it 458

During the coverture, husband and wife are but one person; but when she dies, he has a right to administer exclusive of all other persons *ibid.*

Of Remedies by one Executor or Administrator against another, and how far one shall be answerable for the other.

The plaintiff and *W. H.* administrators to *J. H.* empower the defendants by letters of attorney to get in the intestate's effects in *Flanders*. *W. H.* afterwards settles the account with them, receives the balance, gives a general release, and then dies: The plaintiff, as surviving administrator, prays the stated accounts and releases may be set aside, as being settled without his privity *Page* 460

One administrator, said the court, cannot release a debt so as to bind his fellow, otherwise as to an executor, for each entirely represents the testator; but the release of one administrator may bar both, if the releasee is accountable to them in their own right, and not as administrators. The releases here being unfairly obtained, though effectual in law, were set aside in equity *ibid.*

The interest of an executor arises not from the probate, but from the testator, therefore he may release a debt, or assign a term before probate 461

If a debtor be made executor, the debt is totally extinguished (but see note 3.) otherwise if he be appointed administrator, for it is no extinguishment of the debt, but a suspension of the action, and his representative is chargeable at the suit of the administrator *de bonis non, &c.* of the first intestate *ibid.*

The rights of executors and administrators depend on different foundations, the latter arising from *the ordinary*, the former from the testator *ibid.*

An administration properly defined, a private office of trust, for it is more than a bare authority, and yet less than the interest of an executor *ibid.*

A person acting under a letter of attorney from administrators may be sued by them in their own right as a bailiff or receiver, and need not name themselves administrators 462

Though administrators in an action of trover may name themselves so, yet they need not do it, for they may sue in their own right *ibid.*

Where one administrator dies, the right survives without new letters of administration *ibid.* but see note 1.

What shall be Assets.

A. mortgaged his estate to *B.* who paid no money, but gave a bond for 130 *l.*

A afterwards makes B. his executor: Though at law making the obligor executor extinguishes the debt, yet here the bond is assets in the hands of B. and shall be applied in exoneration of the real estate Page 463
An executor assigns over a mortgage term of his testator to A as a satisfaction of a debt due to A. from the executor, this is a good alienation, and A. shall have the benefit of it against the daughters of the testator, who were creditors under a marriage settlement ibid.
At law an executor may alien the assets of a testator, and when aliened, no creditor can follow them, and where the alienation is for a valuable consideration, this court suffers it as well as at law ibid.
No difference in this court between the power of an executor to dispose of equitable and legal assets 464
An assignment by an executor of a testator's assets to a person who has a sum of money *bonâ fide* due, is as valuable a consideration as for money paid down ibid.
Before the marriage of *Edward Toye* with *Mary Broughton*, it was agreed that 300*l* till it could be laid out in the purchase of lands, should be settled in trust to *Edward Toye* for life, to *Mary Broughton* for life, and in default of issue, to the use of such person, and for such estate as she should by any deed direct or appoint, and for want of such appointment, to her right heirs for ever 465
Mary by deed poll appoints the 300 *l.* to be paid to her husband to be employed by him to such charitable uses, or other intents or purposes as he should think fit: *Edward Toye* by will devises to the defendants *William*, *Sarah*, and *Anne Broughton*, 100 *l.* a-piece, being the money charged on the estate of the wife's father, and declared, in his will, that such disposition was in pursuance of her directions 465
The creditors of *Edward Toye* bring their bill to have the 300 *l.* applied to the payment of his debts, as a part of his assets: This, said the court, is not a naked power only to convey to charitable uses, but ought to be considered as a part of the assets of *Edward Toye*, and applied in payment of his debts ibid.
There are only three ways of property; enjoying in one's own right, transferring that right to another, and the right of representation Page 466
A man cannot by an expression in his will alter the nature of his estate, and disappoint his creditors ibid.
No instance of a construction in favour of legatees to the prejudice of creditors, unless the creditors found their right under the will itself ibid.
Rule where a husband is left sole executor 467
Rule as to survivorship ibid.
Rule upon a devise for life, without impeachment of waste ibid.
Rule as to payment of interest ibid.

See **Assets.**

Rule where a Bill is brought against an Executor of an Executor.

The plaintiff's father died intestate, the mother administered; forty years after the father's death, the son, who had accepted of a legacy under the will of the mother, equal to two thirds of what his father left, brings his bill against the mother's executor, to account for the father's personal estate come to *her* hands To deter others from such frivolous suits, his Lordship dismissed the bill with costs ibid.
The rule in relation to costs to be paid by an executor defendant, is the same in the court of chancery as at law 468

See **Jointenants and Tenants in Common.**

See **Bonds and Obligations.**

See **Creditor and Debtor.**

See **Bankrupt.**

Exposition of Words.

See tit. **Construction.**

N. H. by will gives to *Elizabeth* his wife all his estate, leases, and interest *in his house in Hatton Garden*, and all the goods and furniture therein at the time of his death, and also all his plate, jewels, &c. *but desired her at or before her*

her death, to give such leases, house, furniture, goods, plate, and jewels, into and amongst such of his own relations, as she should think most deserving and approve of, and made her executrix Page 469
Elizabeth, by her will gave all her estate and interest to *H. S.* in the said house in *Hatton Garden*, and after several legacies, the residue of her personal estate to the defendant, and two other persons, and made them executors; but neither gave, at or before her death, the goods in the said house, or her husband's jewels to his said relations *ibid.*
The Master of the Rolls was of opinion that *Elizabeth*, under the will of *N. H* took only beneficially during her life, and that so much of the houshold goods in *Hatton Garden*, as were not disposed of by her according to the power given her by the will of *N. H.* in case the same remain in specie, or the value thereof, ought to be divided equally among such of the relations, as were, &c. at the time of her death *ib.*
The words *willing* or *desiring* in a will have been frequently construed to amount to a trust 470
Where the uncertainty is such that the court cannot possibly determine who are meant in a will, it may be construed only as a recommendation to the first devisee, and make it an absolute gift to him *ibid.*
Where there is a devise to *relations* in a will, the statute of distributions a good rule to go by, in construing who are meant by that word 470
Sir *J. L.* gives, by a codicil to his will, to *E. M.* during her natural life, his house in *Greenwich*, *with* all the household goods that shall be found therein at the time of his decease: The word *with* so conjoins the devise of the house and houshold goods, that the devisee can have no larger interest in the latter than was limited as to the former. *ibid.*
The word *with* would have had the same effect in the case of a grant *ibid.*
A tenant for life of goods, is not obliged to give security for the goods, but to sign an inventory only to the person in remainder 471
A. devises several leasehold estates to two trustees, in trust, if his grand-daughter married without their consent, to convey the premisses to two other trustees, in trust for her separate use during the husband's life, and after her death, for the use and benefit of her issue: Tho' she has no children by the first husband, she has only a right for her life, for the issue by any husband are provided for by this settlement Page 472

See **Devises**, under *What Words pass a Fee in a Will.*

See **Distribution.**

See **Remainder.**

See **Jointenants.**

See **Bankrupt**, under *Rule as to Assignees.* 87.

See **Dower and Jointure.**

Extent of the Crown.

See **Bankrupt**, under *Rule as to an Extent of the Crown.* 262.

Fines and Recoveries.

What Estate or Interest may be barred or transferred by a Fine or Recovery.

A limitation in a will to *C.* and his heirs, to the use of him and his heirs, in trust to pay debts, and after in trust for *D.* and the heirs of his body, and in default of heirs of the body of *D.* remainder to *C* and his heirs: The recovery of *D.* barred the remainder to *C.* as being a remainder of a trust, for a remainder of a legal estate cannot be barred by the recovery of a *cestui que trust* only 473
A common recovery suffered in the Common Pleas will not pass copyhold lands; otherwise as to customary freeholds 474

What Estate or Interest is not barred by a Fine or Recovery.

T. B, by proviso in a marriage settlement gives his wife a power to dispose of 100 *l.* by will to such person as she shall

ſhall appoint, to be paid to the wife within one year after his death, and in default of ſuch payment, *J. M.* is enpowered to make a leaſe of particular lands to raiſe this ſum; the wife makes an appointment of the 100 *l.* but never received it while living; the heirs of the huſband mortgaged the eſtate of *B.* who then had no notice of this power: Afterwards, on *B.*'s purchaſing the eſtate, the heirs of the huſband levy a fine to him, and convey the equity of redemption as a collateral ſecurity, who then had notice of the power; five years incurred after levying of the fine, and no claim made on the part of the appointees of 100 *l.* but they now bring their bill to be paid this ſum *Page* 474

Lord Chancellor held, that the plaintiffs were intitled to 100 *l* and intereſt from the end of one year after the death of *Anne Brickley* the wife of *T. B.* *ibid.*

A bare naked power is not barred by any of the ſtatutes of fines, otherwiſe as to an *intereſſe termini* 476

See **Agreements**, *&c.* under the Diviſion *Which ought to be performed in Specie.* 2.

See **Forfeiture.**

Fixtures.

What ſhall be deemed ſuch.

A mortgage of a brewhouſe with the appurtenances, will not carry the utenſils, but the things only belonging to the out-houſes 477

An executor cannot enter to take away fixtures, without being a treſpaſſer *ib.*

A tenant *during the term* may take away chimney-pieces, and even wainſcot; if *after*, he is a treſpaſſer *ibid.*

By the ſale of a brewhouſe, the utenſils will not paſs 478

Beds faſtened to the cieling with ropes, or even nailed, are not fixtures, but may be removed *ibid.*

Forfeiture.

See **Purchaſe**, *Brandling* v. *Ord*, under, *Of Purchaſers without Notice.*

See **Cuſtom of London.**

Freeman of London.

See under **Bankrupt**, *Carrington*, and under *Who are liable to Bankruptcy.*

Fraud.

See title **Conveyances**, *(fraudulent.)*

See **Deeds and other Writings.**

See **Will.**

Guardian.

Vide tit. **Infant.**

What Acts of his with regard to the Infant's Eſtate ſhall be good.

A. Who had a biſhop's leaſe to her and her heirs during three lives, deviſes the ſame to her daughter an infant, and directs the guardian and truſtees to make purchaſes for the infant's benefit: The guardian, upon the deceaſe of one of the three lives: took a new leaſe for three new lives; The infant dies *Page* 480

The leaſe ſhall go to the heirs *ex parte paternâ*; for the new leaſe is to be conſidered as a new acquiſition, and to veſt in the infant as a purchaſe *ibid.*

The reaſon why an infant's perſonal eſtate turned into real, is ſtill conſidered as perſonal, is, on account of the different ages at which the infant may diſpoſe of his perſonal and his real eſtate and not in favour to one repreſentative more than another *ibid.*

The act of a guardian, where a reaſonable one, will have the ſame conſequence, as if done by the infant at full age; otherwiſe, if wantonly done by the guardian, without any real benefit to the infant 481

Habeas Corpus.

See *under* **Bankrupt**, *Lingood, and* under *Rule as to a Certificate from Commiſſioners to a Judge.* 240.

Heir and Ancestor.

Where Charges and Incumbrances on the Lands shall be raised, or shall sink in the Inheritance for the Benefit of the Heir.

See **Conditions and Limitations.** *Harvey* v. *Aston*, under *In what Cases a Gift or Devise, upon Condition not to marry without Consent, shall be good and binding, or void, being only* in terrorem. Page 361

T. C. devised all his lands to *J. C.* and *J. P.* and their heirs *in trust*, that they should sell his lands in *M* and *P.* and out of the purchase money pay his debts, and as to the rest in trust, to receive the rents, and to make leases for 99 years, determinab'e, &c. and therewith to pay his debts and legacies, then to the use of *J. A.* wife of *C. A.* for life, remainder to the issue male and female of her body, and makes the trustees executors: He likewise gives a legacy of 500 *l.* to his nephew *Thomas Prowse*, to be paid at 21, or marriage, who died before 21: The personal estate of the value of 700 *l.* the lands in *M.* and *P.* not sufficient to pay the debts Page 482

A bill brought by the administrator of *Thomas Prowse*, to have the legacy of 500*l.* raised: *Lord Chancellor* of opinion, as it was charged upon the real, as well as the personal estate, it could not be raised, as the legatee died before the time of payment, and dismissed the bill *ibid.*

Money arising from the sale of a real estate is legal assets only, where it is sold under a bare power given to sell, not where the interest in the estate passes by the will to the devisees; and making the trustees executors, does not alter the case 484

A devise to *A.* and *B.* and their heirs, till such a sum be raised for payment of debts, does not create a fund out of legal assets, but is proper only to give the devisee an interest in the lands specifically, and not to turn them into personal estate *ibid.*

The resolutions are so strong, that there is no difference between a charge on the real estate only, and a charge on the real and personal estate too, they are not to be shaken now 485

Whether a charge on land be created by deed or will, whether given by way of portion for a child, or merely as a legacy by collateral relations, or others, if the party dies before the day of payment, it cannot be raised Page 485

The authority of *Jackson* v. *Farrand*, 2 *Vern.* 424. much weakened by the subsequent resolution in *Carter* v. *Bletsoe*, 2 *Vern.* 617 486

The true reason why legacies, &c. charged on land, payable at a future day, shall not be raised, if legatee dies before the day of payment, is, that this court governs itself by the rules of the common-law; for there, if *A.* covenants to pay money to *B.* at a future day, and *B.* dies before the day, the money is not due to his representative *ibid.*

Where the Heir shall have the Aid and Benefit of the personal Estate.

A. devises lands to *R. M.* in tail then in mortgage for 1300 *l.* and devised other lands to *T. M.* subject to the payment of his debts, in case his personal estate should not prove sufficient: The 1300*l.* must be paid as a debt out of the testator's personal estate, and if deficient, out of the real estate so devised to *T. M.* 487

Where a mortgage is made by a person who is owner of the estate, that mortgage is looked upon as a general debt, and the land only as a security; and therefore personal estate shall be applied in discharge; but if the contest lay between *R. M.* and the creditors of the testator, it would be otherwise *ibid.*

See **Real Estate.**

See **Resulting Trusts.**

See **Conditions and Limitations.** 381

See **Legacies** under *Of a lapsed Legacy by the Legatees dying*, &c.

See **Creditor and Debtor.**

See **Catching Bargain.**

See **Papist.**

See **Tenant by the Curtesy.**

Husband and Wife.

See **Baron and Feme.**

Infants.

How far favoured in Equity.

AN infant may have a decree upon any matter arising on the state of his case, though not particularly prayed by his bill *Page* 6

An infant's personal estate turned into real is still considered as personal 480

Where any person enters upon an infant's estate, and continues the possession, the court of Chancery considers him as a guardian, and will decree an account, and to be carried on after the infancy is determined, unless the infant, after being of age, waived such account 489

The court will not appoint a receiver of an infant's estate, where there is no bill filed *ibid.*

What Acts of Infants are good, void, or voidable.

R. L. devised some land and houses built thereon to his six children; the mother, as guardian to the children, who were all infants, demised the premisses on a building lease for 41 years: The eldest son joined in making the lease, and covenanted that the rest of the children, when of age, should confirm it They all attained 21, and accepted the rent for above ten years, after the youngest came of age, and then brought their ejectment against the lessee, who, by his bill prays to have his lease established 489

Under the circumstances of the case, and particularly the acceptance of the rent for so long continuance, the court decreed the lease to be established during the residue of the term *ibid.*

Where a person is of age when he makes a lease, and has nothing in the premisses, but they after descend to him, the lease shall enure by way of estoppel, otherwise, if he had been an infant *ibid.*

An infant is bound in this court by a marriage-contract, especially if she accepts of pin-money, or after the husband's death, a jointure under the contract *Page* 490

Whatever is sufficient to put a party on an inquiry, is good notice in equity to that party *ibid.*

See **Guardian.** 480.

See **Devises,** under *Of Devises of Lands for Payment of Debts.* 419.

See **Will.** 631.

See **Plantations.**

See **Marriage.**

See **Injunction.**

Injunction.

In what Cases, and when to be granted.

Where there is a trust, or any thing in the nature of a trust, notwithstanding the ecclesiastical court have an original jurisdiction in legacies, yet this court will grant an injunction 491

The rule of the court now, with regard to legatees, is, that they are not obliged to give security to refund on a deficiency of assets *ibid.*

Where the husband of an infant institutes a suit in the ecclesiastical court for her legacy, upon the executors bringing a bill, and suggesting this matter to the court of Chancery, an injunction will be continued to the hearing *ibid.*

Rule as to Injunctions where Plaintiff is a Bankrupt.

See **Bankrupt.** *Anon* under *Bankruptcy no Abatement.* 203.

Vide title **Marriage.**

See **Will,** under *The Power of this Court over the Prerogative Court.*

Insolvent Debtor.

See **Bankrupt**, under *Rule as to the Insolvent Debtors' Act under Commissions of Bankruptcy* Page 255

Jointenanants and Tenants in Common.

Joint-executors and residuary legatees put out money upon security, it shall not survive 467. *note* 1

If there be a jointenancy created by a will, and it happens, by whatever cause, that one of the jointenants is prevented from taking; the whole will vest in the survivor after the testator's death *note* 1. 495

A testatrix devises two houses to *J. P.* and *J. H.* generally, and then says, my meaning is, that the rents of my two houses should be equally shared between *J. P.* and *J. H.* The devisees shall take as tenants in common, and not as jointenants 493

J. H. having, on the death of *J. P.* taken possession of the two houses as survivor, and enjoyed them ever since, *Lord Chancellor* directed him to account for the rents as far back as the death of *J. P.* and not from the filing of the bill *ibid.*

An ejectment not maintainable by one tenant in common against another, without actual ouster 494

If the statute of Limitations be neither pleaded, nor insisted on by the answer, you cannot have the benefit of such bar; though, if it is a stale demand, the court will make use of that statute as a proper rule to go by, and reduce it to a reasonable time *ibid.*

A. devises all the residue of her estate to her two nieces, *Mary* and *Elizabeth*, daughters to her nephew *William Owen* and *Anne* his wife, whom she desires to be trustees for their children, to take care of their legacies; and then says, *My will is, that my estate be equally divided between* Mary *and* Elizabeth, *whom I appoint my executrixes accordingly:* One of the nieces died in the life-time of the testatrix, and all the next of kin had small legacies, except one *ibid.*

The devise to the two nieces is not a jointenancy, for the words *equally divided*, though not annexed to the clause which gives the residue, can relate to that only, and if they had been both living at the death of the testatrix, they would have taken as tenants in common Page 494

Though the words *equally to be divided* in a strict settlement at common law have never been determined, barely of themselves, to make a tenancy in common, yet it has been settled they do so in a will, both with regard to real and personal estate 495

The interest and authority of executors is joint and cannot be divided into distinct powers, but they may be so appointed, as that their authority may commence or determine at different times *ibid.*

The legal interest in a lapsed legacy is in the executor, but the *beneficial* in the next of kin of the testator 496

As an heir does not take real estate by the intention of his ancestor, but by act of law, so with regard to personal, the next of kin take in succession *ab intestato*, and not by the intention of the testator *ibid.*

No person can be a trustee in law, unless he has a vested interest in the thing given *ibid.*

See **Executors and Administrators.** *Partridge* v. *Powlet*, under *What shall be Assets.*

See **Partition.** 541.

Jointure.

A conveyance to make a jointure ought to be to the wife herself and not to trustees: but this defect may be supplied in equity 563

See **Dower and Jointure.**

Judge.

See under **Bankrupt**, *Lingood*, *and* under *Rule as to a Certificate from Commissioners to a Judge* 240

Jurisdiction.

See **Plantations.** 543.

Landlord and Tenant.

THE bare entry of a steward in his lord's contract book, with his tenants, is not an evidence of itself, that there is an agreement for a lease between the lord and a tenant P. 497

A performance only on one side is not a dispensation of the statute of Frauds and perjuries, but casus omissus against which there is no provision 499

Lapsed Legacy.

See Devises under the Division, *Of a lapsed Legacy by Legatees dying, &c.*

See Jointenants and Tenants in Common.

Leases.

See tit. Guardian. 480.

See tit. Statute of Frauds, Perjuries, and tit. Tenant in Tail.

See Landlord and Tenant 497.

Legacies.

A condition in a will, that a legatee controverting the will shall forfeit his legacy, is merely *in terrorem* 404

Specific legacies, See *note* 1. *Purse* v. *Snaplin* 414

This court cannot add a legacy to a will upon parol proof 448

What shall be a satisfaction of a legacy *note* 2. 427

Of vested or lapsed Legacies being to be paid at a future Time, or certain Age, to which the Legatees never arrived.

A testator devises to his daughter *E. H.* 200 *l.* to be paid her at the time of marriage, or within three months after, provided she marry with the approbation of my two sons; *E. H.* died after 21, but without being married: A bill brought by her representative for the legacy 500

This, said *Lord Chancellor* was not vested, for though the clause of consent, as there is no devise over, might be only *in terrorem*, yet, in all cases where the condition of marrying is annexed, it is necessary there should be a marriage, but not obliged to be with consent. *Page* 500 & 502

M. T. being intitled to the reversion of an estate after the death of his wife, devised it to *C. D. and his heirs, so as he should pay to his sister* Elizabeth Odes 100 *l. within six months after the reversion came into possession* 502

Elizabeth Odes died in the life-time of the wife, and *Elizabeth's* representative brings the bill against *C. D.* for the 100 *l.* The legatee dying before the time for raising the 100 *l.* was come, her representative is not entitled, and the bill was therefore dismissed *ibid.*

Where money is given to be paid out of *real estate*, at a future time, if the person dies before the time, it shall sink in the estate; the same as to personal estate, where the time of payment is annexed to the legacy 504

Whether a sum of money be given by way of portion, or as a general legacy, if charged upon land, and the party dies before the time, it cannot be raised *ibid.*

A trust upon lands for raising and paying a sum of money, within six years after the death of the father, to the second son, who died within the time held to be for maintenance only, and not transmissible 504

Vide Heir and Ancestor. 482

Where Legatees shall or shall not, have Interest.

A legacy to a charity generally, from what time it shall carry interest 356 *note* 1

A. gave 500 *l.* to his grandaughter, to be paid at 21, or marriage, and if she die before either contingency, then he devised it over to *B.* A bill brought for interest upon the legacy, and to secure the principal 505

As it is given over, nothing vests in the grandaughter, and therefore she is neither entitled to interest, nor to have the principal secured *ibid.*

A specifick

A specifick devisee of land shall not contribute upon an average with the heir at law, towards satisfaction of creditors while real assets are sufficient Page 505
On a settlement before marriage, *a proviso*, that if a husband and wife die, leaving issue unprovided for, that then the trustees might enter upon an estate, and take the rents thereof, till they had received 200 *l.* for the benefit of such unprovided children, in such manner and proportion, as the survivor of the husband and wife should appoint *ibid*
The wife survived, and appointed the 200 *l.* for a daughter, the plaintiff's wife, being an unprovided child A bill brought to have the 200 *l* raised: Sir *Joseph Jekyll* decreed the 200 *l* and interest by way of maintenance, from the death of the mother, the defendant appealed from that part which allows interest, and the decree was affirmed *ibid*
Wherever the words to be raised *by rents and profits* are used in a deed unless, there are other words to make it annual, the court have always made a liberal construction, in order to obtain the end which the party intended by raising the money, and have allowed *a sale* 506
The appointment of the 200 *l* being in such manner and proportions as the survivor of father and mother shall think fit, not only include a power of raising it by mortgage or sale, but a certain determinate time for raising it, and as the settlement limits no time for payment of the 200 *l.* the father or mother might have made it payable at any time 507
Where a legacy is given by a father to a child, or as a provision, though payable at a future day, yet the child has an immediate right to the interest of the money; *otherwise*, if the legatee be a stranger to the testator *ibid.*

Of specifick and pecuniary Legacies, and here of abating and refunding.

See *Palmer* v. *Mason*. 505.

A devise of a sum of money in a bag, or of a bond or other security, or of money out of a particular security, is a specifick legacy, and shall not abate with pecuniary legatees Page 508
Where a particular debt is devised, and afterwards recovered by the testator in an adversary way, it is an ademption of the legacy: If voluntarily paid off by the debtor to the testator it is otherwise *ibid.*

Ademption of a Legacy.

See Devises, *Purse* v *Snaplin*, under *Of void Devises by Uncertainty in the Description of the Person to take* 414

Sir *Samuel Garth* having, upon his daughter's marriage, given a bond to leave 5000*l* at his death among her younger children, by will creates a term for years, in trust to apply the rents and profits for maintenance of his daughter's children till 21, and also gives his personal estate in trust, to pay the produce of it to his wife for life, and after her death to pay 1500 *l* to *A.* one of the daughters of his daughter, and 3500 *l.* among the other younger children of his daughter, as she shall appoint, and if no appointment, equally between them at 21 or marriage, and declares the legacies shall be in full satisfaction of the bond 509
She must elect to claim under the will, or under the bond; if she claims under the latter, can take no benefit under the former *ibid.*
Where a particular thing is given in discharge of a demand, and the party insists on his demand, he must not only waive that particular thing, but all benefit claimed under the whole will *ibid.*
Lord *Hardwicke* declared he would not extend the construction of devises in satisfaction, further than they had already gone: He decreed the children born after the death of the testator should have their share under the bond 510

Of a lapsed Legacy, by Legatees dying in the Life-time of the Testator, and here in what Cases it shall be good, and vest in another Person to whom it is limited over.

M. C. by her will devised to *G. C.* his heirs, executors, &c. all that her messuage in *Great Lincoln's Inn Fields*, with all her furniture, houshold stuff, &c. and all her real and personal estate not otherwise disposed of, to the intent that out of the said real and personal estate, her several legacies might be paid *Page* 510

She then gives to *Thomas Lewis* 2000 *l.* in trust for the use of his daughter *Mary* and he, till she attain the age of 18, or be married, to place out the same at interest, and pay it with the produce thereof to his daughter for her own use, on her attaining the age of 18, or marriage, which should first happen: The 2000 *l.* was by the will directed to be paid to *Thomas Lewis* within *one year and a half* after the decease of the testatrix *ibid.*

Thomas Lewis died in the life time of the testatrix; *Mary Lewis* half a year after, unmarried, and the bill was brought by the representative of *Mary* to have the 2000 *l.* paid to him: the infant dying before the time of payment to the trustee was come, the legacy is not raisable for the plaintiff's benefit *ibid.*

A residue directed by a will to be divided among six persons, at the death of testator's wife; two died before her: held by Lord *Talbot* that the interest of the two was a vested one, and transmissible, and depended not on surviving the wife 511

J. S. gives to *R. P.* 300 *l.* to be paid within 3 years after his decease, in trust to put the same out to interest, and to pay the profits thereof to his niece *W.* for her separate u[illegible] and after her decease 200 *l.* there[illegible] to her son *T.* and the other 100 *l.* to her son *C.* 512

W. and *T.* both die within the 3 years, yet Sir *Joseph Jekyll* decreed the whole money should be paid, though charged on both funds *ibid.*

Legacy out of personal estate payable, or given at a certain time, and interest in the mean time, is a vested one; otherwise as to legacies out of real estate, for if legatee dies before the time is come, it sinks into the inheritance: the same construction where a legacy is given out of a mixed fund of real and personal estate at a certain time, or to be paid at a certain time *Page* 512

If the infant had survived *the year and half*, tho' the trustee was dead before, she would have been entitled to the legacy, so likewise if she had died after the time aforesaid, and before *eighteen, or marriage*, her representative would have been entitled *ibid.*

Where a legacy charged on real estate is clearly intended as a portion, the court goes as far as it can to hinder the raising it out of land for the benefit of representatives *ibid.*

See **Conditions and Limitations.** 379

See **Devises**, under *Where a Devise shall or shall not be in Satisfaction of a Thing done* 425.

Legacy vested. See **Heir and Ancestor.**

See **Injunction.** 491.

Limitation, (*statute of*).

Rule as to that statute 282

If the statute of Limitation be not pleaded nor insisted upon by the answer, you cannot have the benefit of it 494

Maintenance for Children.

See **Legacies** 504.

See **Marriage** 517.

WHERE there is a falling of stock without the neglect of the trustee, he is not liable to make good the deficiency, but is answerable only as far as the value, especially where it was specifick stock 513

Where a father is sufficiently competent, the court will give no direction with regard to an infant's maintenance 515

See **Portions**, under *At what Time they shall be raised.*

See **Custom of London.**

Marriage.

Conditions in restraint of marriage, See *note* 1. *Page* 381

Where it is clandestine 515.

The want of a sufficient law to restrain clandestine marriages, not only introductive of great mischiefs, but lays courts of judicature under great difficulties 515

The sentence of the ecclesiastical court cannot be reversed in a summary way, but by appeal only to proper judges; nor can a prohibition to that court be granted upon a petition; by *motion* and proper suggestion it may 516

An injunction does not deny, but admits the jurisdiction of the court of common law; and the ground on which it issues is, that they are making use of their jurisdiction contrary to equity *ibid.*

So where a trustee is suing in the ecclesiastical court for payment of *cestui que trust*'s legacy into his own hands, or in the case of a portion, where the husband is suing for it *there*, before a settlement is made; this court will, upon the same grounds, restrain them from proceeding *ibid.*

The power of this court over infants, resulted back to them upon the dissolution of the court of wards and liveries, by the statute of the 12 *Car.* 2. *ibid.*

Though this court cannot, on petition prohibit the ecclesiastical court; yet they will restrain a person who has married a *ward* of this court candestinely, from proceeding on an excommunication, either against the infant or his guardian 517

Though a ward of the court is married with the consent of his friends, yet there must be an application *here* for an increase of maintenance, and a suit in the ecclesiastical court for that purpose is improper *ibid.*

See Conditions and Limitations. 376

See Agreements, Articles and Covenants.

Master and Servant.

What Remedy they have against each other 518

The plaintiff's son was apprentice to the defendant for seven years, but quitted him on being misused, and on the defendant's proceeding at law on a bond given by the plaintiff, he brings a bill for an injunction, and for the delivery of the bond *Page* 518

A court of equity has no jurisdiction in matters of this nature, but belongs to justices of peace, and therefore the plaintiff was ordered to pay costs at law and in this court *ibid.*

Misuser of an apprentice is not a foundation for coming into a court of equity; for if an action is brought by a master against the father of an apprentice, for a breach of covenant in quitting his service, if misuser appears, this is no breach *ibid.*

Mesne Profits. 519.

See Occupant.

Money.

Money has no ear-mark; and therefore courts of equity have been very cautious how they follow money, which has been laid out in land; though they have done it in some instances 59

If you move for an application of money placed in the bank, by a former order, you must not only have a certificate that the money was paid into the bank, but that it is actually there at the time of the motion 519

Mortgage.

A mortgage of a brew-house with the appurtenances will not carry the utensils, but the things only belonging to out-houses 477

Whether by a devise of all lands, tenements and hereditaments, a mortgage in fee shall pass *note* 1. 605

Of cancelled ones.

If a mortgage is found cancelled in the possession of the mortgagee, it is as much a release as cancelling a bond,

but there must be some deed to revest the estate in the mortgagor P. 520

What will, or will not, pass by it.

See Fixtures. 477.

Where a Person who wants to redeem, must do Equity to the Mortgagee before he will be admitted. 477.

Where a first incumbrancer by judgment, has likewise a mortgage, though there is another judgment prior to the mortgage, yet, if the mortgagee had no notice of it, the court will not direct a sale of the estate in favour of the creditor upon the second judgment, unless he will pay off the principal and interest, both of the first judgment and mortgage ibid.

See Tenant by the Curtesy.

See Heir and Ancestor.

Ne exeat Regno.

THE writ of *ne exeat regno*, which was originally confined to state affairs, is now very properly used in civil cases, but then, to induce the court to continue it till the hearing, the plaintiff must shew the debt he demands is certain 521

Next of Kin.

See Jointenants and Tenants in Common.

Note of Hand.

Where an original note is lost, and a copy of it is offered in evidence, you must shew the original note was genuine, before you will be allowed to read the copy 446

Notice.

Plea of a Purchaser, without Notice, over-ruled. 522.

A. devises the estate in question to *B.* in tail, remainder to *C.* in fee; the bill brought by the heir of the body of *B.* for deeds and writings, and possession: The defendants plead that they are purchasers for a valuable consideration from *C.* and had no notice of the plaintiff's title *Page* 446

Where the defendants claim under a conveyance, in which there is an estate-tail prior to the estate under which they purchased, it is incumbent on them to see if that estate is spent, and therefore the court over-ruled the plea *ibid.*

See Conditions and Limitations, under, *Who are to take Advantage of a Condition, or will be prejudiced by it* 384

See Fines and Recoveries.

Oath.

See Evidence, Witnesses and Proof, under, *Of examining Witnesses* de bene esse, *&c.* 450.

See Alien. 23.

Occupant. 524.

A. Being seised of a church lease to him and his heirs, during three lives, by settlement before marriage limits it to the use of himself for life, and to his first and every other son in tail male: A person may take such estate so granted in fee, determinable on lives, by way of remainder, as *a special occupant* 524

The rule in equity is the same as at law, as trespass will not lie for *mesne profits*, till possession recovered, so neither can a bill be brought for an account thereof till then 525

An executor is not compellable here, or at law, to take advantage of the statute of Limitations 526

Office.

See under **Bankrupt**, *Butler* and *Purnel*. 210 & 215.

Papist.

A BILL, to discover whether *A* under whose will the defendant claimed, was a papist at the time of a purchase made by *A.* of the estate from the plaintiff's ancestor; the defendant pleads as to the discovery the statute of the 11 & 12 *W.* 3. by which, if *A.* was a papist, she was disabled to take *Page* 526

The court said, under the rule, a man is not obliged to accuse himself, is implied, that he is not to discover a disability in himself; and as *A.* would not have been obliged to discover, the defendant, who claims under the same title, is intitled to the same privileges and takes the estate under the same circumstances: *The plea allowed* 526

The bill seeks a discovery whether one *Southcote* was not a person professing the Popish religion before he conveyed the freehold and copyhold estates to the defendant, in the bill mentioned, as a purchaser thereof 528

A plea of the statute of the 11 & 12 *W.* 3. for preventing the growth of popery so far as it goes to the discovery, whether *Southcote* was a papist, *allowed* *ibid.*

Penal laws are not to be construed according to rules of equity 537

A devisee from a papist, by reason of the penal law which would affect him, from the incapacity in the devisor to devise is not compelled to discover whether the devisor was a papist 538

The rule of law is, that a man shall not be obliged to discover what *may* subject him to a penalty, not what *must* only 539

The defendant *Moreland's* plea to the discovery of the title deeds, disallowed *ibid.*

Every heir at law has a right to inquire by what means, and under what deed he is disinherited, and a plea therefore to *such discovery* will not be allowed *ibid.*

An heir before he has established his title at law, may come here to remove terms out of the way, which would prevent his recovering there, and may also come here for the production and inspection of deeds and writings *Page* 540

Paraphernalia.

See **Dower and Jointure.** 440

Parental Influence. 10 n. 4

Parol Agreement.

See **Partition.**

Parol Evidence.

See **Custom of London.** 407

Parson.

See **Bankrupt**, *ex parte Meymot.* 196

Parties.

See **Bill.** 209

Partition.

Mary and *Susan Jackson*, the daughters and co-heirs of *James Jackson*, being seised in fee of certain lands, the former married *Thomas Ingram*, and the latter *William Rittle*, and by a mutual agreement between their husbands in 1686, a partition was made of the said premisses between them and the heirs of *Mary* and *Susan*, by which each of them agreed to take one part thereof, which they did, and entered into possession, and *Susan* now holds such of her said premisses by virtue of the partition, and *Mary* enjoyed her part till her death, and being at the time of the partition somewhat larger than *Susan's*, *Mary*, in consideration thereof, paid the taxes and levies charged upon both 541

The husbands are both dead, and the bill is brought against *Susan Rittle* to confirm the division of the said estate: The agreement of the husbands could not bind

bind the inheritance of the wives, nor is a long enjoyment under it of any force, unlefs it had been originally the agreement of the wives, but *Sufan Rittle* confenting to the enjoyment of the feveral parts of the faid premiffes, that have been held in feveralty; it was decreed that the plaintiff and defendant fhould take in feveralty accordingly *Page* 542

A parol agreement for an equality of partition of a long ftanding by perfons who had a right to contract, and acknowleged by all the parties to have been the actual agreement, and accordingly put in execution, will be eftablifhed by this court 542

If a jointenant upon equality of partition thinks proper to accept of a contingent uncertain advantage, where one moiety of the lands is of fuperior value to the other, it will not vacate the agreement *ibid.*

Partners.

See pages 183, 184. 225. 227.

Perfonal Eftate.

See Rents.

See Real Eftate.

Pinn-Money.

See Baron and Feme. 269

Plantations.

This court has no jurifdiction over lands at *St. Chriftopher's*, and a demurrer will lie to a bill brought here, for the delivery of poffeffion of lands there 544

Lands in the plantations are no more under the jurifdiction of this court than lands in *Scotland* *ibid.*

An infant may bring a bill for an account of rents and profits againft a perfon who keeps poffeffion after the death of the infant's anceftor *ibid.*

Demurring for want of jurifdiction is informal and improper; a defendant fhould plead to the jurifdiction *ibid.*

Plantations originally members of *England*, and fubject to the laws thereof, unlefs in fome cuftoms, which they have a power of making *Page* 544

Plea.

See Alien.

See Anfwers, Pleas, and Demurrers.

See Papift.

See Purchafe, under *Purchafers without Notice.*

See Bill for Difcovery.

Policy of Infurance.

If a policy of infurance differs from the label, which is the memorandum or minutes of the agreement, it fhall be made agreeable to the label 545

It is not a fufficient ground for coming into a court of equity, that an infurance is in the name of a truftee, unlefs he refufes the *ceftui que truft* his name in an action at law 547

If a fhip is decayed, and goes to the neareft place, it is the fame as if repaired at the place from whence the voyage was to commence, and no deviation *ibid.*

Where there are the words *at and from* a place to *England*, *firft arrival* of the fhip is implied, and always underftood in policies 548

An agent for the owner of a fhip, when he fetches the policy is not obliged to compare it with the label *ibid.*

Portions.

What fhall be a fatisfaction of a portion note z 427

At what Time Portions fhall be raifed or Reverfionary Eftates, or Terms fold for that Purpofe.

Where there is a term for years for raifing daughters' portions, payable at a certain time, and a vefted intereft, they fhall not ftay till the death of father and

and mother; but the court will lay hold of the slightest circumstance in a settlement, that shews an intention to postpone the raising them in the life of the father and mother *Page* 549
Directing a gross sum to be raised, does not imply that it shall be raised at once, for it may be raised out of the rents and profits, and so laid up till it amounts to that sum 550
The court lays great stress upon a particular time being appointed for the payment of a portion, and has enlarged the power of trustees to raise it within the time 551
Where there is a power to charge an estate with a gross sum, it implies a power to charge an estate with interest likewise 552
The principal of a portion to be paid to sons at 21, to daughters at 21 or marriage, with interest at five *per cent per ann.* from the death of the father, to the payment thereof: The interest ought not to accumulate till the portions are payable, but to be paid annually, for it is given as a recompence in the mean time, till the principal becomes due 553
Whether a portion charged on land, be given with or without interest, by deed or by will, if the person dies before it becomes payable, it shall sink in the estate 555
The case of *Cave* v. *Cave*, 2 *Vern.* 508. is intirely mistaken by the reporter, for as it is stated in the Register, which was searched by *Lord Chancellor's* order it is impossible there could be that question in the cause, which the book states 556
A portion given to one, payable at a certain age, and if he dies, limited over to another, without mentioning any age, if the first dies before the time of payment, it vests in *the second* immediately *ibid.*
Jackson v. *Farrand*, 2 *Vern.* 424, is an anomalous case, and in the cause of *Cotton* v. *Cotton*, *Lord Chancellor* declared he should lay no stress upon it *ibid.*
Where there is a power of charging interest, it shall be considered as maintenance, for giving interest is the same thing as giving express maintenance *ibid.*

If a younger brother has a provision under a settlement, and lives with the elder, whose estate is charged with the portion, he shall have an allowance for his maintenance out of the interest due *Page* 556

Rule as to the Consideration.

See under **Bankrupt**, *Marsh*, and under *The Construction of the Statute of the* 21 *Jac.* 1. *with respect to Bankrupt's Possession of Gooods after Assignment* 158

Power.

Under a power of appointment to *such* of the testator's children as, *&c.* an exclusive appointment to *one* is good 389
Where property is settled upon husband and wife for their lives, remainder to the children, in such manner as the husband should appoint, and if no children, then to his executors, *&c.* In default of appointment, the whole will vest in the children 426, 427
A bare naked power is not barred by any of the statutes of fines 476

Whether well executed or not.

J. C. by will devises the produce of 1000 *l.* *S. S.* stock to *F. C.* for life, and gave him a power to dispose of 400 *l.* thereof, by any writing signed in the presence of three witnesses, and if *F. C.* made no appointment, the 400 *l.* devised over to a charity: *F. C.* made his will, gave several legacies, and then devises the residue of his personal estate among his nearest relations; held to be no execution of the power, and that the 400 *l.* did not pass by the devise of the residue 558
Parol evidence not allowed to prove *F. C.*'s intent to dispose of the 400 *l.* *ibid.*
A person may execute a power, without reciting it, but necessary he should mention the estate which he disposes of 559
Freehold lands will only pass by a devise of all his lands, and not *copyhold,* unless

unless testator has nothing but copyhold: *Leasehold*, if there are no other will pass by the words *Lands and Tenements* Page 560

Of the Right Execution of a Power, and where the Defect of it will be supplied.

It was agreed, in consideration of 5000*l.* of the portion paid to the father of the defendant, on his marriage, that he should be put into immediate possession of part of the estate; and as to the remainder, it was to be settled on the father for life, with a power for him to make a jointure of such of the lands as he thought proper, not exceeding 600*l. per ann.* remainder to the son in tail, remainder over, and the settlement was made accordingly 561

By deed of the 5th of *May* 1725, *Henry* the father, before his marriage with the plaintiff his second wife, conveys an estate of 900*l. per ann.* to trustees, in trust to pay 200*l.* clear, as pin-money to the intended wife, and if she survives him, to pay her 300*l. per ann.* rent-charge for her jointure *ibid.*

After marriage, he, by a second deed, gives her another 300*l. per annum* clear, as a further provision by way of jointure 561

By a deed of the 15th of *January* 1731, as a further provision for the wife, and in execution of the power, he conveys all the said premisses to the same trustees to raise the further sum of 100*l.* for pin-money, and the neat sum of 600*l. per ann.* as a provision for her in case she survives her husband, in bar of all other provisions before made; and in this deed is the following declaratory clause; It is hereby declared and agreed, by and between, *&c.* that it is the intention of this deed, and of the preceding ones, to secure a jointure to his then wife, not exceeding 600*l. per ann.* 562

The plaintiff having survived her husband, brings her bill against his son, and the trustees under the several deeds, to have the benefit of these provisions, all or some of them: The defendant and the trustees were decreed to convey to the plaintiff a jointure, not exceeding 600*l. per ann.* but to be made liable to taxes, repairs, *&c.* and to hold and enjoy the same against the defendant, *&c.* during her life Page 562

A conveyance to make a jointure ought to be to the wife herself, and not to trustees 563

A court of equity will supply a defective execution of a power, as well in the case of younger children and a provision for a wife, as in favour of purchasers or creditors *ibid.*

Lord Chancellor, on a rehearing, still continuing of his former opinion, confirmed his decree *in toto* 564

In aiding the defective execution of a power, either for a wife or child, it's being intended for a provision, whether voluntary or not, will intitle this court to carry it into execution, in aid of a wife or child, though defectively made 567

That a wife or child, who come for the aid of this court, to supply a defective execution of a power, must be totally unprovided for, is not the right rule; but that a husband or father are the proper judges what is a reasonable provision, is a good and invariable rule 568

As the plaintiff has not the provision stipulated for her, she must be considered as totally unprovided for, and therefore, according to the rules of equity, intitled to be aided in carrying a defective provision into execution 569

Suppose there has been an excess in the execution of a power, as where a man leases for 40 years who could only do it for 21, this is void only for the surplus, and good within the limits of the power *ibid.*

See Charity. 356.

See Dower and Jointure. 440

Process.

See Arrest. 55.

Prochein Amy.

A *prochein amy* need not be a relation, but must be a person of substance because liable to costs 570

Prohibition.

See Marriage. *Page* 515.

Purchase and Purchasers.

Vide tit. Vendor and Vendee.

Vide tit. Notice.

Purchaser pendente lite 89

A purchaser decreed to pay the costs and expences of a surrender of, and admission to copyhold premises 96 *n.* 1.

Of Purchasers without Notice 571.

A man who purchases for a valuable consideration, with notice of a voluntary settlement, from a person who bought without notice, shall shelter himself under the first purchaser *ibid.*
A man cannot defend himself in this court as a purchaser for a valuable consideration, under *articles* only *ibid.*
Where defendants plead a former suit, that the court implied there was no title when they dismissed the bill, is not sufficient, they must shew it was *res judicata* *ibid.*
A tenant in tail out of possession, cannot bring a bill to perpetuate testimony till he has recovered possession by ejectment *ibid.*
A bill dropped for want of prosecution, is never to be pleaded as a decree of dismission in bar to another bill *ibid.*
A fine levied by a termor for years is a forfeiture, but the reversioner has five years after the expiration of the term to enter *ibid.*
New assignees under a commission of bankruptcy, on filing a supplemental bill, shall have the benefit of the proceedings in the suit commenced by the old assignees *ibid.*
A purchaser of an estate, after it has been in controversy in this court, on filing his supplemental bill, comes here *pro bono et malo*, and is liable to all costs from the beginning to the end of the suit 572

Whether Lands purchased after a Will pass by it.

If a man covenants to lay out a sum of money in the purchase of lands, and devises his real estate before he has made such purchase, the money to be laid out will pass to the devisee *P.* 572
Where a person contracts for a purchase of lands after a will made, they will not pass thereby, but descend to the heir at law 573
Where after making a will a person agrees for the purchase of particular lands, if a good title cannot be made, as the heir at law cannot have the land, he shall not have the money intended to be laid out *ibid.*

See Agreements, Articles, and Covenants. 11.

See Bankrupt, under *Rule as to Assignees* 89.

Real Estate.

See Heir and Ancestor.

Where the Personal shall not be applied in Exoneration

H. L. the plaintiff's father, being seised in fee of several lands, devises them to his wife for life, and then to his son *Robert* and his heirs, *and gives to the plaintiff a legacy of* 150*l* *to be paid to her in a twelve month's time after his son* Robert *should come to enjoy the premises*; and if *Robert* died before his mother, then, that *Henry*, another son, coming to the possession thereof, and surviving his mother, should pay the plaintiff 200*l* 573
Robert and *Henry* died before the mother, but *Robert* left a son, against whom the bill is brought for the legacy: A decree for the legacy at the Rolls, with interest at 4*l. per cent.* from a year after the death of the mother, and upon appeal to *Lord Chancellor* the decree was affirmed 574

Conditions

Conditions in wills are often construed so, from the nature of the thing itself, where the words merely of themselves are not conditional *Page* 574

Though a legacy is not expresly said to be paid out of an estate, nor by whom, yet it has been considered as a charge thereon, where the general intent of the testator has appeared 575

A condition will bind the heir, if the devise so takes effects as that he must claim under the ancestor, as much as if the ancestor had been in possession *ibid.*

The 10,000*l.* charged by Lord *Bingley*, on the term 1000 years shall not be paid out of his personal estate, but the land on which it was originally charged must bear the burthen of it. *ibid.*

Receiver.

See tit. **Infant.** 48[illegible].

Rule as to appointing him.

The court will not appoint a receiver of an infant's estate where there is no bill filed 578

Recoveries.

See **Agreements, Articles, and Covenants**, under *When to be performed in Specie.* 2.

See **Fines and Recoveries.** 473.

Relations.

See **Exposition of Words.** 469.

Remainder.

A remainder over shall take effect notwithstanding the condition annexed to the preceding estate, and on which the remainder is limited, should never arise or be performed 424. *n.* 2.

A. devises lands to his wife for life, and after her decease to his son and daughter, *John* and *Margaret*, to be equally divided between them, and the several issues of their bodies, and for want of such issue, to his wife in fee *Page* 579

This will not create a cross remainder, which can only be raised by an implication absolutely necessary, which is not the case here, for the words *several* and *respective*, effectually disjoin the title *ibid.*

Cross remainders have never in any case been adjudged to arise merely upon these words, *In default of such issue* 580. *note* 1

J. H. devised his real estate to trustees and their heirs, to the use of them and their heirs, upon several trusts therein after mentioned 581

These words, said *Lord Chancellor*, are declaratory of his intention, that the legal estate so given, should be used to support all the trusts and limitations after declared; part of which were to the after-born sons of *J. H.* and made such a construction as supported the intentention, being of opinion it was not inconsistent with the rules of law and equity *ibid.*

Though contingent remainders by law must vest during or at the instant the particular estate determines, yet it does not hold in the case of trusts: The ground the law goes upon is, that a freehold cannot be in *abeyance*, because there must be a tenant of the freehold to perform services, and answer all writs concerning the realty, but this objection is obviated in the case of an equitable estate, because the trustee is considered as the tenant of the freehold to perform services, *&c.* 590

Where there are ever so many contingent limitations of a trust, it is sufficient to bring the trustees only before the court together with him in whom the first remainder in the inheritance is vested *ibid.*

The statute of uses was made to execute and bring the state to the use; and after the statute, the *cestuique use* was seised of the use at law, as before he was of the use in equity, but the necessities of mankind have obliged judges to give way to uses notwithstanding 591

Contingent uses, springing uses, executory devises, &c. were foreign to the notions of the Common-law, but were let in by

construction by judges themselves, upon *uses*, after they became legal estates *Page* 591
Courts of equity have given the same power to *cestuique trust*, as to alienations, as if it was an use executed; his *fine* therefore, if tenant in tail, bars his issue, and his *recovery*, remainders over *ibid.*
Upon a trust in equity, no estate can be gained by wrong, as there might of a legal estate; therefore on a trust in equity no estate can be gained by *disseisin, abatement, or intrusion* *ibid.*
There many instances where there would be mergers of legal estates, and yet courts of equity have never suffered mergers of trusts 592
Uses executed, and mere trusts stand on different foundations, and will not be governed by the same reasoning *ibid.*
Where a trust is in its nature executory, it is incumbent on the court to follow the intention of the parties, as far as the rules of law will admit 593
Where the court makes use of the words strict settlement in an order, it implies a direction to the master to have trustees to preserve contingent remainders inserted *ibid*
However improperly a will is penned, if the testator intended a *strict settlement*, the court will direct accordingly *ibid.*
All trusts are executory, and whether a conveyance be directed or not, the court must decree one, when asked at a proper time 594
The legal estate in trustees will support contingent remainders over of a trust declared by will, where no conveyance is directed *ibid.*
Where an estate is limited to the ancestor for life, and afterwards to the heirs males of his body, the estates are connected, and make an estate tail in the ancestor, where it is by the same conveyance: The same has been held where it did not arise by the same conveyance, but by way of resulting use 595
Lord Chancellor inclined to think that the resulting trust of a freehold, to support contingent remainders of a trust, might connect in the same manner with the limitation in tail, though not created together with it *ibid.*
In a limitation to support contingent remainders it is not material to restrain it to the life of tenant for life of the land, provided it be restrained to the life of a person in being *Page* 596
There may be a resulting trust, under a trust to support contingent remainders for the heir at law, in the same manner as under an executory devise 597

Remainder-man.

Where a remainder man may have the title deeds deposited 431

Rent.

In what Cases there may be Remedy for Rent in Equity, when none in Law 598

A bill may be brought for rent where the remedy at law is lost, or very difficult, and this court will relieve on the foundation of payment for a length of time *ibid.*

Representation.

See Distribution.

Resulting Trusts.

See Assets. 59.

See Creditor and Debtor. 392.

See Trust and Trustees.

Rule of the Court.

See Money. 519.

Satisfaction.

THE doctrine of, See note 2, to *Bellasis* v. *Uthwat* 427.—See also tit. Devise.

Scrivener.

See under **Bankrupt** *Burchall*, and under *The Construction of the repealing Clause in the 10th of Queen Anne* Page 441

Separate Maintenance.

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See under **Bankrupt**, *Walker* v. *Burrows*, and under *Rule as to Assignees.* 93.

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Where a surety pays off a debt, he is entitled to have an assignment of the security 135

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See **Waste.**

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Tenant for life of goods is not obliged to give security for the goods, but to sign an inventory only to the person in remainder. 471

Tenant by the Curtesy.

A. Seised in fee of a freehold estate, mortgages it, and afterwards she intermarries with *B.* *A.* dies, and the mortgage is not redeemed during the coverture *Page* 603

This is notwithstanding such a seisin in the wife, as intitles the husband to be tenant by the curtesy of the mortgaged premisses, for in this court, said *Lord Chancellor*, the land is considered only as a pledge or security for the money, and does not alter the possession of the mortgagor *ibid.*

An equity of redemption may be devised, granted, or entailed, and such entail may be barred by fine and recovery, and the person intitled to it is the owner of the land, and a mortgage in fee is considered as personal assets 605

If a testator, after devising all his lands, tenements, and hereditaments, forecloses an equity of redemption on a mortgage made to him in fee, such estate will not pass by these general words of lands, &c. because a foreclosure is considered as a purchase *ibid.*

A mortgage in fee, made after a devise of the estate, is in law a total revocation; in equity *pro tanto* only 606

A husband shall be tenant by the curtesy of the *equitable* estate of the wife *ibid.*

An heir at law can oblige a tenant by the curtesy to keep down interest, as much as any other tenant for life *ibid.*

Sir *T. S.* by will directs his trustees to convey a full fourth part of all his freehold lands, &c. to the use of his daughter *Priscilla* for life, and so as she alone, or such person as she shall appoint take and receive the rents and profits thereof, and so as her husband is not to intermeddle therewith, and from and after her decease, in trust for the heirs of the body of the said *Priscilla* for ever 607

This being an executory trust, the wife took an estate for life only, and the husband therefore not intitled to be tenant by the curtesy *ibid.*

In the case of a trust estate for payment of debts, or in the case of an equity of redemption, a husband may be tenant by the curtesy of an estate devised to the wife for her separate use *P.* 609

Where a trust is executory, and to be carried into execution by this court, they will direct a conveyance of lands, notwithstanding they are gavelkind, to be made according to the rule of common law *ibid.*

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Vide tit. Vendor and Vendee.

Where a remainder man may have the title deeds deposited 431

Tenant in Tail.

If tenant in tail make a lease not warranted by the statute, and suffer a recovery, it lets in the lease: the same as to a judgment, bond, or statute 9

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The issue in tail is not bound to perform the covenant of his ancestor 10 note 3

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Of a Modus.

Issues directed by this court to try a *modus*, though established by two verdicts, the plaintiff intitled to his costs at law only, and not in equity 610

Trade and Merchandize.

If the court of chancery retain bills, where it is a legal demand, they must judge upon the facts relating to such demand, and, unless doubtful, will not turn the parties over to a trial at law 612

If a person on whom a bill of exchange is drawn, says in a letter to a drawer, it shall be duly honoured and placed to your debit, this is an acceptance, and will make him liable, for a parol acceptance has been held to be good, and so determined in a case made for the

the opinion of the court of King's Bench, in the time of Lord *Hardwicke* Chief Justice *Page* 612
The payee of a note intitled to interest against the acceptor, tho' no protest, for all the damage that can be had in such a case is the interest 613

Trust and Trustees.

See tit. Fines and Recoveries.

A remainder of a *legal* estate cannot be barred by the recovery of *cestui que trust*, but the remainders of the *trust* can 473
The words *willing, desiring*, &c. will create a trust See note 1 to page 470
In what cases, the court will change trustees 18
The trust of a copyhold will pass by a will without any surrender 390
In the case of a lease in trust, whatever new alterations are made, it is still subject to the old trust 480 note
No person can be a trustee in law, unless he has a vested interest in the thing given 4[illegible]6
Where there is a falling of stock, without the neglect of the trustee, he is not liable to make good the deficiency 513
Whether there shall be a tenant by curtesy out of a trust. See title *Tenant by Curtesy*.
Where there are ever so many contingent limitations of a trust it is sufficient to bring the trustees before the court together with *him*, in whom first the remainder of the inheritance is vested 590
Courts of equity have given the same power to *cestui que trusts* as to alienation, as if it was an use executed 591
Upon a trust in equity no estate can be gained by *wrong*, as there might of a legal estate, therefore on a trust in equity, no estate can be gained by disseisin, abatement or intrusion 591
There are many instances where there would be *mergers* of legal estates, and yet courts of equity have never suffered *mergers* of trusts 592
Where a trust is in its nature *executory*, it is incumbent on the court to follow the intention of the parties, as far as the rules of law will admit 593
All trusts are executory; and whether a conveyance be directed or not, the court must decree one, when asked at a proper time *Page* 593
The legal estate in trustees will support contingent remainders of a trust, declared by a will where no conveyance is directed 594
There may be a resulting trust under a trust to appoint contingent remainders for the heir at law in the same manner as under an executory devise 597
When a trustee shall be charged for a breach of trust 430
A trustee has as much the benefit of the pleading of this court, as *cestui que trust* 450
The court will not compel trustees to join in a sale, which will not only destroy contingent remainders, but all the uses in a marriage-settlement; for whatever the old notion was, said *Lord Chancellor*, in regard to such trustees, it is now held that they are guilty of a breach of trust in joining to destroy contingent remainders, whether the settlement be voluntary, for a valuable consideration, or by will 614
By settlement before marriage it was agreed, that 2000 *l.* in the hands of a trustee should be laid out in land, to the use of the husband for life, then to the wife for life, f[illegible] her jointure, and to the children equally; and in case the husband died without issue, to the wife in fee; and if he survived, to him in fee 615
The husband and wife being necessitous, the trustee paid them 600 *l.* on a release, and their joint bond of indemnity, and afterwards 400 *l.* more on the like bond, and a new agreement that the remaining 1000 *l.* should be laid out in the purchase of an annuity, for the separate use of the wife during the coverture, and in fee in case of survivorship *ibid.*
The trustee afterwards paid the husband this 1000 *l.* likewise; he died without issue, and left the wife destitute. A bill brought against the representative of the trustee for this breach of trust, and to be paid what shall be due to the wife for the 2000 *l.* out of his personal estate *ibid.*

In *March* 1738, the Master of the Rolls directed that the wife should be paid what should be remaining due to her for the 2000*l.* and interest, out of the trustee's personal estate, in a course of administration *Page* 593

Upon appeal to *Lord Chancellor*, he recommended it to the parties, from the hardship on one side, and the dangerous consequences on the other, to find out a third way of moderating the affair 615

The agreement afterwards of the executrix of the trustee, to pay the wife of the *cestui que trust* an annuity of 100*l.* quarterly, during her life, tax free, from *Lady day*, 1737, and the costs of the suit, made an order of the court *ibid.*

See **Devises**, *Kiev Ivie*, under *What Words pass an Estate tail* 429

Of Resulting Trusts, and Trusts by Impli-

Where an estate is purchased in the name of one, and the money paid by another, it is a trust notwithstanding there is no declaration in writing 59

In the case of voluntary settlements and wills, if there is no declaration of the trusts of a term, it results to the donor; otherwise where it is a settlement for a valuable consideration 191

Tho' there be no express trust in a deed yet if it may be collected from circumstances arising out of the deed itself inconsistent with an absolute conveyance; parol evidence may be admitted to prove a trust for the grantor 447

R. S. incumbent of the rectory of *B.* devises his perpetual advowson, donation and patronage of the parish church of *B.* and all glebe lands, profits, and appurtenances to the same belonging, to *G. S.* willing and desiring her to sell and dispose of the same to *Eaton College*, and on their refusal, to *Trinity College, Oxford*, and on the refusal of both these societies, to any of the colleges in *Oxford* or *Cambridge*, who will be the best purchaser *ibid.*

There is in this case no resulting trust of the advowson of *B.* to the heirs at law of the testator, but a devise of the beneficial interest therein to *G. S.* with an injunction only to sell to particular societies *Page* 618

The general rule, that where lands are devised for a particular purpose, what remains after that purpose is satisfied, results, admits of several exceptions 619

There can be no constructive trust, but where the intent of the testator is apparent, here *willing and desiring G. S.* to sell, &c. are more properly words of injunction than trust *ibid.*

Where a real estate is devised to be sold for payment of debts, and no more said, there it is clearly a resulting trust 620

The devisee in this case, and not the heir at law, intitled to present on the avoidance that happens by the death of the testator *ibid.*

W. H. by will devises the perpetual advowson of *S.* to *W. C.* &c. upon trust to present his son *W.* to this living, and that after the church shall, next after his death, be full of an incumbent, then to sell the perpetuity, and to apply the profit arising from the sale, first, for the payment of debts, and the overplus he distributes in thirds to his daughters 621

The trustees presented *W.* the son, who died before the advowson was sold, leaving a daughter an infant, who by her next friend brings her bill, insisting, after debts and legacies paid, there is a resulting trust to the heir at law of the testator in the advowson *ibid.*

Lord Chancellor was of opinion, the whole legal estate was devised away, and that there was no resulting trust for the heir at law *ibid.*

At common-law, where an estate is devised to trustees and their heirs, the whole is gone from the heir, but in equity there may be a beneficial interest remaining to the heir upon the trust 622

A certain rule in equity, that where an estate is charged with an incumbrance, or payment of creditors, and after such charge or payment, the surplus is given over, the whole property vests in the residuary legatee *ibid.*

The

The right of the heir to the equity of redemption of an estate, though debts and legacies will exhaust the whole, is not founded upon his election to redeem or submit to a sale, but upon the ownership he has of the estate *P.* 622
If *A.* seised of an advowson, be also incumbent, and devises it, the devisee, on his death, is intitled to nominate 623
If the ownership and property of the advowson be in devisees, that they, and not the heir at law, nominate, is a consequence of such ownership: Nor will it make any difference, whether the devisee has the advowson in him as a personalty, or a realty *ibid.*
Trustees postponing, or accelerating the sale of estates devised to them, will make no alteration in favour of the heir, to the prejudice of the *cestui que trusts* *ibid.*

Of Trusts to attend the Inheritance.

In the case of a settlement for a valuable consideration, if there be a term created, and no trusts declared thereof, it will attend the uses of the settlement, and will not result to the grantor, *Brown* v. *Jones* 188

See **Creditor and Debtor.** 392

Of Trustees how to account, and what Allowances to have.

See **Maintenance for Children.**

See **Evidence, Witnesses and Proof** 450.

Vendor and Vendee.

WHETHER it is necessary for a vendor in order to compel a specific performance of his agreement to produce his title deeds, or an abstract *within the time* limited by the articles. See 12. *note* 1.

Voluntary Deed.

See tit. **Conveyance, fraudulent**

The Effect thereof.

The court will not decree a voluntary conveyance to be delivered up to a purchaser for a valuable consideration, unless obtained by fraud *Page* 625
A voluntary deed, kept by a person, and never cancelled, will not be set aside by a subsequent will *ibid.* See the *note* thereto
A father, by settlement, grants to his five daughters 4000 *l.* a piece, but to provide against the event of the residue's being of greater value, binds himself in 25,000 *l.* to secure the surplus over and above the 20,000 *l.* This must be considered in the nature of a bond to the daughters, and will take place against all voluntary claimants; otherwise, as to creditors for a valuable consideration 626

Uses.

With respect to the effect of a subsequent declaration of uses in altering the prior uses, see title **Agreements**, and *Stapleton* v. *Stapelton* 2
If tenant in tail suffers a recovery to the use of himself in fee, he is in of the old use 9. *note* z
What will amount to a covenant to stand seised to uses 191. *note* 3
The statute of uses was made to execute, and bring the estate to the uses; and after the statute, the *cestuique use* was seised of the use at law, as before he was of the use in equity; but the necessities of mankind have obliged judges to give way to uses notwithstanding 591
Contingent uses, springing uses, executory devises, &c. were foreign to the notions of the common law, but were let in by construction (by *judges* themselves) upon uses, after they became legal estates 591
Uses executed, and mere trust, stand on different foundations, and will not be governed by the same reasoning 592

Usury.

See **Catching Bargain.**

See under **Bankrupt**, *Thomson*, and under *Rule as to Drawers and Indorsers of Bills of Exchange*.

Waste.

WHETHER a devise of the rents and profits of an estate to *A* for life *sans waste*, empowers him to commit waste *Page* 467 *note* 1

Will.

See tit. **Devise.**

See tit. **Construction.**

Mistakes in wills are never to be supposed, if any construction that is agreeable to reason can be found out 415

Whether lands agreed to be purchased before a will, (the purchase being compleated after the will) will pass by it 572

A subsequent will cannot set aside a prior voluntary deed 625 and *note*

The Power of this Court over the Prerogative Court.

Where a person is sole devisee of the real estate, and one of the witnesses to the will resides altogether abroad, upon a commission granted to examine such witness, the court will at the same time, make an order that the original will be delivered out by the proper officer of the prerogative court, to a person to be named by the party praying the commission, that it may be carried out of the kingdom; he first giving security, to be approved by the judge of the prerogative court, to return the same 627

The court of Chancery, where necessary, will make an order upon the prerogative office to deliver a will to the register's office in *Symmond's-Inn*, and to lie there till the court of Chancery has no further occasion for it 628

The court of Chancery, upon motion, ordered the prerogative office to deliver a will to be proved in *Glocestershire*, under a commission from the court of Chancery, and would not suffer an officer of the prerogative court to attend the execution of the commission. *Page* 628

The Validity of a Probate, where examinable.

A bill for a perpetual injunction to stay proceedings in the prerogative court for controverting the will and codicils of *John*, Duke of *Buckinghamshire*, after the determinations already had; the injunction before granted made perpetual *ibid.*

An admission by a party concerned in matters of fact is stronger than if it had been determined by a jury, and facts are as properly concluded by admission as by trial 629

Where parties are dissatisfied with a probate, this court will suspend their determination, till a trial has been had of the validity in a proper court 630

This court cannot determine the validity of a probate adversarily; but if it comes here incidentally, and that incident is admitted, they determine it, and hold the parties bound by their admission *ibid.*

There is no difference between parties admitting things proper to be determined by the court in which the admission is made, and admission of things cognizable in another court, but they are equally bound 630

An infant, *unless in matter, or fraud, or collusion appears*, is bound by a decree made for his benefit; and, with respect to personal estate, except for the causes before mentioned, the parol never demurs 631

Where there is a decree for the benefit of an infant, and he dies, his executor, tho' it may be for his own benefit to do so, shall never dispute that decree *ibid.*

See **Legacy**, under the Division, *Ademption of it.*

See **Evidence, Witness, and Proof,** under *Where parol or collateral Evidence will, or will not, be admitted, &c.*

See **Power**, under *Of the right Execution of a Power, and where a Defect therein will be supplied.*

Witness.

See Evidence, Witnesses, and Proof,

Words of Limitation.

See Devises.

Words.

See Exposition of Words.

Writ.

Of the De Homine Replegiando, *and its Effects.*

The writ *de homine replegiando* is an original writ, and the party may sue it out of right, and if it is once issued, this court cannot supersede it; but if the party who sues it out is not intitled, it must be pleaded to below *Page* 633

See Ne exeat Regno.

F I N I S.